DISSOLUTION OF MARITAL TIE BY A MUSLIM WIFE: RIGHTS AND LIMITATIONS

Thesis Submitted for the Award of the degree of

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IN

LAW

BY

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UNDER THE SUPERVISION OF

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CERTIFICATE

This is to certify that Mr. Mohd. Wasim Ali has completed the present research work entitled "***Dissolution of Marital Tie by a Muslim Wife: Rights and Limitations***" under my supervision. His research work is an original contribution towards the academic excellence. He has fulfilled all the requirements needed for the submission of this research work. Throughout his research work, he has been sincere, studious and highly obedient. I further certify that the instant research work has not been earlier submitted elsewhere for the award of any Ph.D. Degree. I deem it a work of high quality and excellence for the award of Ph.D. Degree.

I wish him all the success in life

Prof. Saleem Akhtar
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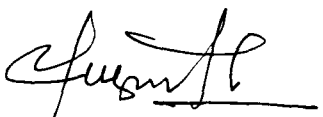

Mohd. Wasim Ali

CONTENTS

CHAPTER - I

INTRODUCTION

It is a universally acknowledged truth and Judicially endorsed view that Islamic Law of divorce in its pristine purity is an admirable system of modern jurisprudence providing many rational, revolutionary and humanitarian gender concepts which could not be conceived by any other system of law then in force at that time as well as at present time. Justice V.R. Krishna Iyer in a felicitous manner in *Yusuf Rowthan v s Sowramma*[1] observed:

> *"Since infallibility is not an attribute of judiciary, the view has been ventured by Muslim Jurists that the Indo-Anglian Judicial exposition of Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Indeed a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce".*

The above observation of learned Judge present a correct, just, unbiased and authentic view of Islamic law of divorce. Islam provides a modern concept of divorce by mutual consent what is now known as the break-down theory of divorce. The modern concept of break-down theory of divorce does not want the court to go into the causes of break-down of marriage. The Islamic Jurists also did not authorise the Qazi or court to inquire into causes of antipathy and

1. A.I.R. 1971, Ker. 271.

hatred of a wife seeking dissolution of marriage. If it is established by the facts and circumstances of a case that marital relation between the spouses has poisoned to such an extent that it is impossible for them to pull on any longer, the policy of Islamic law of divorce desires the separation of disgruntled spouses as against the continuation of strained relation in the interest of couples as well as society at large. Islam also does not want the matter to be taken to the court at all unless it becomes unavoidable. Unequivocally declaring "divorce to be the worst of all permitted things", the Holy Prophet (PBUH) warned his people to keep away from it. And where this worst were to happen unavoidably, he wanted the husband or wife (who ever might be aggrieved) or both of them jointly, to act quietly and privately. He did think of Judicial intervention only in exceptional cases where either the husband or wife was at fault leading to such break down but insisted on the subsistence of marriage.

The history of Arab civilization bears the live testimony of gender discrimination, exploitation and denial of basic rights which were essential to their dignified human survival in the society. The existence of a female baby in the pre-Islamic Arabian society was not like that of an independent human being who could decide and determine her future course of life. Her individual existence in her

paternal home was being considered as a constant source of humiliation, shame and an undesirable economic burden even after being given in marriage because of her highly insecured future in matrimonial home. Immediately before the advent of Holy Prophet (PBUH), the consent and choice of woman in her most personal matter like marriage and divorce was of no avail. It was the domain of her father and guardian to give her in marriage and obtain the separation on her behalf. She could be driven out of her matrimonial home for any or no reason. The husband had absolute right to divorce and also could revoke the divorce and divorce again as many times as he preferred. He could, if he was so inclined, swear that he would not have sexual relation with his wife for any length of time keeping her in suspensory state. Sometimes, when as Arab wanted to desert his wife, he would say that she was like the back of his mother. This would have an effect of irrevocable divorce. No set procedure and formula was being observed.

The women amongst the Arabian society did not had corresponding right of divorce to get herself released even from a most detestable undesirable and torturous union. Islam through its Holy Prophet (PBUH) took the cognizance of these deep rooted social and moral evils and gender injustices with extreme disapproval and established that women were no more inferior to

men in any sense and possess equal rights. The Holy Qur'an at the top of its voice declared to this effect.

> *'O' people be careful of your duty to your Lord*
> *Who created you from a single being and created*
> *its mate Of same (kind) and spread from these too*
> *many men and women.*[2]

This is a declaration in plain terms that, in essence human dignity and fundamental rights, all human beings of whatever sex or race or nationality stand on equal footing because they all ultimately spring from a single source.

Contradicting the notion that women have no right or have but inferior to men, the Holy Qur'an came out with plain and unambiguous declaration:

> *"And women shall have rights;*
> *Similar to those against them (men)*
> *According to what is equitable."*[3]

A simple reading of the instant Holy verse makes it clear beyond all doubt that rights of women against their men are similar to those which the men have against their women. It also follows from the Holy verse that spousal rights also stand on equal footing and subjecting them to different significance amounts implicit negation of supreme command expressed in the instant Holy verse.

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2. Holy Qur'an; IV:I
3. Holy Qur'an; II: 228

This revelation, must no doubt, have caused a stir in a society which never recognised any right for women. The divine declaration in this respect was really a revolutionizing one for Arabs who hitherto regarded women as their chattels. The women were now given position by the verse II: 229 equal to men in all respect.

The statement that the men are a degree above to women does not nullify the rights asserted in the Holy Qur'an. The words are added simply to show that superior authority to run the house must be given to either the husband or wife and it has been given to the husband. Therefore, as far as Islam is concerned, it promulgated the doctrine of human equality as well as sex equality in comprehensive sense which negates all kinds of inequalities, social and economic, based on gender.[4]

So far as the right to the dissolution of marriage is concerned, the permission to it has been given both to the husband and wife to release themselves from marital bond in case of absolute necessity when the spousal relations have poisoned to a degree which makes peaceful home life impossible. But Islamic legal system does not believe in unlimited opportunities for divorce even on genuine grounds and necessity because any undue increase in the facility of divorce would destroy the stability of family life. Therefore, while

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4- Maulana Muhammad Ali: *The Holy Qur'an: Arabic Text. Translation and commentary.* P.67, 4th ed. (1951) Anjuman Ishaat-e-Islam Lahore.

allowing divorce on just and reasonable cause, the divine law has taken great care to introduce checks and balances designed to limit the use of available facility. The Holy Qur'an enjoins to this effect:

> *"Divorce is permissible only twice;*
> *After that parties should either hold together*
> *On equitable terms or separate with kindness"*[5]

It necessarily follows from the above Holy verse that right to divorce is not an absolute and unilateral right vested in the husband. It can also not be exercised arbitrarily and capriciously. It is not the right for the husband to sever his relations with his wife without a great deal of thinking. It has, therefore, afforded all possible opportunities for reconciliation and provided ample time to reflect over pros and cons of the matter. Remedies are therefore suggested to avoid divorce as far as possible.

The Holy Qur'an says:

> *"If ye fear a breach between them (twain)*
> *Appoint an arbiter from his fold and an arbiter*
> *from her folk, If they wish peace, the God will*
> *cause their reconciliation".*[6]

The above verse gives not only the principle of divorce which is Shiqaq or a disagreement to live together as husband and wife but also the process to be adopted when rupture of marital relation is feared. The two sexes are here placed on the level of perfect

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5. Holy Qur'an, II: 228
6. Holy Qur'an; IV:35

equality. The expression "A breach between two...." would imply that either the husband or the wife wants to break-off the marriage agreement and hence either may claim a divorce when parties can no longer pull on in agreement. In the process to be adopted, both husband and wife are to be represented on a status of equality; an arbiter has to be appointed from his people and another from her people. The arbiters are adivsed to find out differences and reconcile the parties to each other. If reconciliation cannot be brought about, a divorce must follow. In order to check the hasty action and leave the door open at many stages, the proper method of pronouncing divorce has been prescribed by the Holy Qur'an and traditions of the Holy Prophet (PBUH).

As the husband has been given the right to secure release from the marriage bond similar rights have been accorded by Islam to the wife. There are two ways in which a woman is allowed to seek separation from her husband: First through mutual agreement between the husband and wife i.e., Khula and Mubara'at. Secondly, through a judicial decree by filing a suit against the husband in the court of law i.e., under the Dissolution of Muslim Marriages Act, 1939.

Inspite of this glaring fact that a substantial reforms in the pre-Islamic system of divorce was introduced by the Holy Prophet

(PBUH) with a view to prevent the exploitation of women and give them a status equal to men as well as a moral social and economic security right from the childhood to motherhood. But this ceaseless effort of Holy Prophet, due to deplorable distortion made by, and unfortunate metamorphosis undergone at the hands of Indo-Anglian courts have failed to earn the admiration and appreciation. More than a century ago privy council in famous case *Moonshee Buzloor Raheem v/s Shamsoonnissa Begum*[7] observed that "matrimonial law of the Muhammandan, like that of every ancient community, favours the stronger sex where the husband can dissolve the marital tie at his will". About the law of talaq, the Privy Council observed yet in another case[8] that a divorce by talaq is mere arbitrary act of the husband who may repudiate his wife with or without any cause".

That law on the point has stood unchanged during all these hundred years and recent reference may be made to the celebrated decision of Supreme Court in *Mohd. Ahmad Khan v/s Shah Bano Begum*[9] wherein a five judges Bench has again observed that, "undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so for reasons good bad or indifferent even for no reason at all".

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7. (1867) II MIA 551 (610)
8. Moonshee Buzul-Ul-Rahim v/s Lateef-un-Nissa (1981) 8 MIA 397 (395)
9. (1985) 2 SCC 556

Besides it, the on going controversy regarding mode of pronouncement of triple divorce and its instantaneous effect on marital relation has added fuel to the fire and as a result a concerted effort is going on at global level to abrogate and replace Muslim Personal Law by common or uniform civil code.

I got tempted to pick-up-the instant work in the wake of frequently subjecting Muslim personal law relating to status to unfounded and baseless criticism from bar to bench that under Shariah law a Muslim Wife's rights to the dissolution of her marriage are inferior to the rights of her counterpart male. The critics have gone to the extent of saying that under Muslim Personal Law right to dissolve the marital tie squarely rests with the husband only which is unilateral, arbitrary, capricious and is designed to undermine and degrade the position of women and fails to pass the constitutional test of gender equality. In order to nullify the baseless allegations and to find out the solution of the questions raised by the antagonists, I have made all concerted efforts to clarify the true law on the subject on the basis of authentic and authoritative source material.

The present work is basically confined to study a Muslim woman's rights and limitations to the dissolution of her marital tie available under classical Islamic jurisprudence and thus covers in its

The present work is basically confined to study a Muslim woman's rights and limitations to the dissolution of her marital tie available under classical Islamic jurisprudence and thus covers in its ambit Khula, Mubara'at, Tafwid, Ila, Zihar, Lian etc. The grounds of Dissolution of Muslim Marriage Act, 1939 have discussed in detail. The relevant judicial pronouncements of the representative character of pre and post partitioned India and Pakistan have been referred to and duly analysed.

In view of the source materials relied upon and methodology adopted for, it may be placed in the category of doctrinal research. The entire thesis is divided into nine chapters excluding conclusion.

Chapter First which deals with the *'Introduction'* gives a brief idea of the aims and objectives of the study of the Dissolution of Marital Tie by a Muslim wife. It further points out the significance of the subject in appropriate perspective highlighting ambit and scope of the work.

Chapter second deals with the *'Institution of Divorce: Origin and Development'*. Divorce as an institution under various ancient civilizations has been studied at length. The concept, forms and procedure of divorce under the Shariah Law has been subjected to in-depth study in the light of relevant verses of Holy Qur'an, Hadith

and juristic work. The Ahsan and Hasan forms of divorce have been dealt with in detail under the instant chapter.

"Talaq-al-Biddat: Classical View and Judicial Trends", constitutes Chapter third of the thesis. The historical-background of the Talaq-al-Biddat has been traced out. An attempt has been made to analyse the effects of triple divorce in the light of Shariah law. Divergent views of four Imams and the Judicial pronouncements of representative character, the opinion of modern Islamic Jurists belonging to Deoband School of thoughts and Ahle-Hadith have also been put on record in detail as to the effect of triple simultaneous pronouncement of divorce in single Tuhr (period of purity). In order to put an end the practice of triple divorce, the preventive legislative measures enacted in Muslim countries, like Turkey, Tunisia, Algeria and Pakistan have been examined in brief.

The fourth chapter is dedicated to *"Divorce by Khula"* and *"Divorce by Mubara'at"*. An in-depth study has been made to trace out the religious basis of Khula. The nature and quantum of compensation, the effect of non-payment of compensation on marital rights like, dower and maintenance, have been analysed at length in the light of Shariah. The power of the court to determine the amount of compensation in the cases of disagreement and circumstances disentitling the husband to claim the amount of compensation has

been deeply studied in the light of judicial interpretation of the superior courts of Pakistan. The legislative recognition of Khula in Muslim countries has also been briefly discussed.

"Delegation of Divorce", forms Chapter Fifth of the thesis. The conceptual analysis, religious basis and classification of Talaq-e-Tafwid constitutes the subject matter of discussion under the Chapter. The relevant of judicial pronouncements have also been referred to in the course of discussion.

The Divorce by *Ila, Zihar* and *Lian* constitute chapter sixth, seventh and Eight respectively of the thesis. The concept, utility, legal effects and religious basis of these forms of divorce have been dealt with in detail.

"The Muslim Women's Right to Dissolve Marriage under Statutory Law" has been discussed under chapter Ninth of the thesis. Various grounds of divorce under Section 2 clauses (I) to (IX) of the Dissolution of Muslim Marriage Act 1939 have been analysed in the light of Shariah law and relevant judicial pronouncements in India.

The concluding part of the thesis aptly summarises the entire discussion of the topic in the various chapters. An attempt has been made to provide certain suggestions which may go a long way for the amelioration of the deteriorating conditions of women in sub-continent.

CHAPTER - II

THE INSTITUTION OF DIVORCE: ORIGIN AND DEVELOPMENT

Divorce as an Institution:

Divorce has been a controversial subject. On the one had it can not be denied that dissolution of marriage brings about the disintegration of family life with consequent uncertainty and unhappiness for the children born of the marriage but on the other hand, it must be equally conceded that dissolution of marriage is evidently desirable when the spouses can no longer live in harmony and have lost all the mutual regard love and affection. The continuance of an unhappy marriage breeds hate and disgust and may ruin the lives of the parties involved or at least one of them.[1]

Islam takes realistic and sympathetic view of human affairs and, therefore, it attaches great importance to the happiness of both the spouses. It provides that every attempt should be made to maintain a marriage but once it is established that a marriage has proved a failure and has become a mere hollow shell, Muslim law does not scruple to allow the parties to separate from each other. In Islam marriage in ordinary course is to last till one of the spouses dies but if a husband and wife can not live happily together and very objects of marriage are defeated and it becomes a mere farce, then its

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1. K.N. Ahmad: *The Muslim Law of Divorce*; P.1 (1984) Kitab Bhawan New Delhi.

continuance is no longer considered desirable. Under such circumstances dissolution of marriage is allowed under Islamic Law.[2]

The Roman Catholic Church considered marriage merely sacrosanct, and therefore left no way open to its dissolution. Therefore the orthodox Hindu society permitted no divorce and regarded their marriage as an indissoluble and eternal union. Contrary to these approaches, Islam under certain unavoidable circumstances leaves a way open to its dissolution. This is however, permitted only in exceptional and unprecedented circumstances.[3]

Inspite of this fact, the antagonists and critics of Islam under the grab of gender emancipation and empowerment allege the Islam to have originated the idea of divorce and go to the extent of saying that it has encouraged, facilitated and promoted the termination of marriage which is derogatory to the dignity and status of woman in contemporary society.

In order to know the truth behind the frivolous and unfounded allegation, it is necessary to look briefly into historical origin and development of the institution of divorce and reform effected in it by Islam.

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2. Ibid.
3. Dr. Zeenat Shaukat Ali: *Marriage and Divorce in Islam: An Appraisal*, P.165, (1987) Jaico Publishing Housing-Bombay.

Divorce Under ancient civilizations:

The history of various human civilizations reveal that among all the ancient legal systems, the divorce has been regarded as a necessary corollary to the law of marriage and this capricious power of the husband to divorce his wife was regarded as unequivocal and as a natural suffix to his marital rights. This right was denied to the wife in all the circumstances.[4]

The ancient Hebraic law permitted a husband to divorce his wife for any or no cause. He was irrationally loaded with the power of desertion against the wife. There were few or no checks on the arbitrary and capricious use of such powers. Women were, however, not allowed to demand the divorce from their husbands even for a just cause. Various tribal systems were equally pro-male. Later the Shamaities exhibited a change in their divorce policy but Hillelites continued their traditional practices. The situation among the Jewish tribes and pagan Arab remained unchanged upto the appearance of the Holy Prophet (PBUH). Athenians and the Israelites were no exception to this trend.[5]

According to Roman Catholic doctrine, a consummated Christian marriage is a sacrament and must as such remain valid

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4. Ibid.
5. Syed Ameer Ali: *The Sprit of Islam*: P.241 ed. (1987) Delhi.

forever. It represents the union between Christ and the Church, and is consequently as indissoluble as that union. It is also permanent according to the law of nature, because only a permanent marriage can fulfil this object and God made it so at the beginning of our race, when He decreed that a man shall leave his father and his mother and shall cleave to his wife, and they shall be one flesh. Inspite of this doctrine, which could never work in practice, the Roman Catholic Church allowed separation of married couple under the exceptional circumstances on the ground of invalidity of marriage. Lord Bryce has pointed out in his book, "Studies in History and Jurisprudence", that rules covering these exceptional cases were so numerous and so intricated that it was easy, given a sufficient motive, whether political or pecuniary, to discover some ground for declaring almost any marriage invalid. A man might secure a divorce by swearing that he was his wife's distant cousin or had loved her sister in his youth or had before his marriage stood godfather to one of her near spiritual kindred. Thus, among the Roman the legality of the practice of divorce was recognised from the earliest times. However, in Rome the frequency of divorce varied with the type of marriage.[6]

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6. M. Mazheruddin Siddiqi: *Women in Islam*, P.60.Ist ed. (1987) Adam Publishers, Delhi

The Protestant reformers never accepted the Roman Catholic doctrine of the indissolubility of marriage except by death. They all agreed that adultery should be recognised as a ground for divorce, and most of them regarded malicious desertion a second ground for the dissolution of marriage. The views of Protestant reformers influenced the course of legislation in various Protestant countries and the laws were passed permitting divorce for a number of reasons. Apart from adultery desertion, an attempt made by one of the couples on the life of the other is specified in the law of many countries as a legitimate ground for divorce. Ill-treatment of some kind has also been laid down in some countries as a sufficient reason for the dissolution of marriage. In United States, divorce is obtainable for cruelty. In United States a husband who is able to support his wife but for a certain time neglects to do so may be divorced. Similarly, in some states divorce may be obtained on proof of habitual in drunkenness of either party for varying terms. In England, impotency, physical incapacity, venereal and other diseases in the husband or wife, existing at the time of marriage and afterwards, but unknown to the other party, are recognised as a legitimate ground of divorce.[7]

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7. Ibid. P.61.

The Western Christian church made both marriage and divorce difficult because of its doctrine that sex is inherently sinful. Marriage was made a sacrament and under the influence of St. Augustine became indissoluble. But the impossibility of forcing the people to live together in the intimacy of marriage compelled the church to authorise the separation from bed to board. Moreover, numerous impediments to marriage enabled the church lawyers to find the grounds to declare any marriage invalid from the beginning provided plausible reasons whether personal, political or pecuniary could be brought forward. Catholicism has maintained this traditional attitude. Papal canon law which prevails in Italy, Spain, the Irish Free state and Austria for Catholics and among faithful Catholics everywhere, permits separation for adultery or unnatural offences, cruelty, impotency and consanguinity. Incontinence, before marriage discovered after marriage is one of the several grounds for the annulment of marriage. Recent studies indicate that numerous divorces in the United States are procured by the persons of Catholic affiliation.[8]

The Protestant reformers held that the severity of the traditional doctrine fostered immorality among the masses while maintaining relatively easy divorce for the rich and powerful and they regarded marriage as a civil contract. However, all of them

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8. *Encyclopaedia of the social Sciences*: Vol. 5th , P.178. New York.

admitted the rightfulness of divorce on the grounds of adultery and malicious desertion; some added excessive cruelty, insanity and incurable disease in the grounds for divorce. Contrary to the catholic precedent, they fully sanctioned the marriage of innocent party. In Protestant and catholic communities alike, however, marriage continued to be surrounded in popular esteem with religious sentiments, and divorce was viewed with dread attach to whatever is tabu. Secular views of marriage and divorce have won increasing acceptance since the French revolution and have steadily been reinforced by the intellectual and the industrial changes of the recent times. Apart from the Catholic countries above-mentioned European countries introduced considerable uniformity in both grounds and frequency of divorce. The orthodox Eastern Church, whose canon long prevailed in Russia and Hungry and are still influential in Serbia, Bulgaria and Rumania, permits absolute divorce but no Judicial separation[9].

Among western countries, France has made divorce much easier. The 1792 law of divorce says that marriage is merely a civil contract, and that the facility in obtaining the divorce is natural consequence of individual's right of freedom, which is lost if engagements are made indissoluble. Divorce is granted on various

9. Ibid. P.179.

grounds, among others, on the mutual desire of the two parties, and even at the wish of one party on the ground of incompatibility of temper, subject to only to a short period of delay and to the necessity of appearing before a family council who are to endeavor to bring about reconciliation. In the year of 1804, however, under the provisions of "Napoleon's code civil de Francis", divorce was made more difficult. Mere incompatibility of temper is no longer recognised as sufficient cause for divorce. Marriage may still be dissolved on the ground of mutual consent, but on certain conditions only i.e., the husband must be at least twenty-five year of age and the wife twenty-one; they must have been married at least for two years and not more than twenty-five years and the wife must not be over forty-five years of the age; the parents or other living ascendant of both the parties must give their approval; and the mutual and unwavering consent of the married couple must sufficiently prove that their common life is insupportable to them, and that there exists in reference to them a peremptory cause of divorce.[10]

Divorce amongst Arabs:

The constitution of Arab society, when the laws of Islam came into force, was that of a people which had not yet, generally speaking, completely lost its nomadic habits and characteristics. The

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10. Supra note 6. P.62.

Arabs were divided into tribes and sub-tribes, and their sexual relations were, mostly, governed by the local tribal customs and usage. However, the customs regulating the relations of sexes and the status of children, issue of such relations, were at the time of establishment of Islam uncertain and in the state of transition. Side by side with a regular form of marriages, which fixed the relative rights and obligations of the parties and determined the status of children, there flourished the types of sexual connection under the name of marriage, which are instructive as relics of the different stages through which the Arabian society must have passed. It is narrated that there were four kinds of marriages in vogue at the time when Islamic law came into force.[11]

First, a form of marriage which has been sanctioned by Islam, namely a man asks another for the hand of the latter's ward or daughter, and then marries her by giving her a dower.[12]

Second; a custom according to which a man would say to his wife, send for so and so (naming a famous man) and have intercourse with him. The husband would then keep away from society unless she had conceived by the man indicated, but after pregnancy became

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11. Abdur Rahim, M.A.: *The Principles of Muhammad Jurisprudence*; P.4, (1983) Allahabad.
12. Ibid.

apparent, he would return to her. This originated from the desire to secure noble seeds.[13]

Third, a number of men, less than ten, used to go to a woman and have sexual connection with her. If she conceived and was delivered of a child, she would send for them a call and they would be all bound to come. When they came and assembled, the women would address them saying, "you know what has happened. I have now brought forth a child. O, so and so? (naming whomsoever of them she choose) this is your son"[14]

Fourth, a number of men used to visit a woman who would not refuse any visitors. These women were prostitute and used to fix flag at the doors of their tents as a sign of their calling. If a woman of this class conceived, the men who frequented her house would be assembled and physignomists used to decide to whom child belonged. It simply means that Arabs used to contract what has been called a temporary marriage under the name of Muta.[15]

Before the advent of Islam a women was not a free agent in contracting her marriage. It was the right of her father, brother or cousin or any other male guardian to give her in marriage, whether she was widow or old or young, or virgin to whomsoever he chooses.

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13. Ibid.
14. Ibid.
15. Ibid.

Her consent was of no avail. There was no restriction as to the number of wives an Arab could have. The only limit was that imposed by his means, opportunity and inclinations. Unrestricted polygamy was the order of the day.[16]

The power of divorce possessed by the husband was unlimited in pre-Islamic Arabia. They could divorce their wives at any time for any reason or without any reason. They could also revoke their divorce and divorce again as many times, as they preferred. They could moreover, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery dismiss them, and leave them with such notoriety as would deter other suitors, while they themselves would go exempt from any responsibility of maintenance or legal punishment.[17]

As it has been pointed out that a nomadic Arab was at liberty to have as many wives as he could desire, he was likewise absolutely free to release himself from the marital tie. His power in this connection was absolute and was not required or expected to assign any reason for its exercise. He was not bound to observe any particular procedure. The word commonly used for this purpose was

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16 Ibrahim Abdel Hamid; *Dissolution of Marriage in Islamic Law*, P.765, (1956), The Islamic Sultural Center New Delhi.

17 Ibid.

Talaq. It was upon his discretion whether he would dissolve the marriage absolutely and thus set woman free to marry again or not. He might if he so choose, revoke the divorce and resume marital connection. Some times an Arab would pronounce Talaq ten times and take his wife back and again divorce her and then take her back and so on. The wife in such a predicament was entirely at the mercy of the husband and would not know when she was free. Some times the husband would renounce his wife by means of what was called a suspensory divorce. This procedure did not dissolve the marriage, but it only enabled the husband to refuse to live with his wife, while the latter was not at liberty to marry again. Another form of divorce in use among the Arabs was "Ila" the husband swearing that he would have nothing to do with his wife. According to some, such an oath had the effect of causing an instant separation, but other say that it was regarded as suspensory divorce. Sometimes when an Arab wanted to divorce his wife, he would say that she was like the back of his mother. This would have the effect of an irrevocable divorce and was known as Zihar.[18]

The wife among the Arabs had no corresponding right to release herself from the bond of marriage but her parents by a friendly arrangement with the husband could obtain a separation by

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18. Supra note 11, P.7.

returning the dower if it had been paid or by agreeing to forego it if not paid. Such an arrangement was called "Khula" and by it marriage tie would be absolutely dissolved. A woman if absolutely separated by Talaq, 'Zihar' 'ila' or Khula might remarry, but she could not do so until sometime called the period of 'Iddat' elapsed. This precaution was evidently observed in the interest of child that might be in the womb of mother. But an Arab before Islam would sometime divorce his pregnant wife, and she would under an agreement with him is taken over in marriage by another. On the death of the husband period of Iddat was one year.[19]

Thus, in pre-Islamic Arabia, no doubt, the institution of divorce existed but it was resorted to not for the purpose of repairing past mistakes and securing future marital happiness after putting an end to a loathsome hatred, torturous unhappy and disharmonious union, but it was aimed at degrading and degenerating the dignity and status of women and was used as an instrument of torture by leaving her in suspensory, vagrant and destitute state after pronouncing divorce. Men used to divorce their wives, generally, out of sudden capric or whim passion and frivolity providing pretexts for divorce. The husband could divorce his wife when she was in menstruation or even when she was pregnant or nursing a child

19. Ibid, P.8.

without undertaking any obligation towards her maintenance. Most of the Arabs considering it a great dishonour to see their divorced wives marring others did not let them go even after their separation, but detain them in their own houses neglected and suspended.

These social and moral ills and gender injustices drawned the attention of the Prophet (PBUH) of Islam. Fully conscious of evils, flowing from the divorce, he, under the divine inspiration framed the laws of marriage and divorce in order to remove these evils. These laws ensured permanence of marriage without impairing individual freedom.

Divorce under Shariah:

The Arabic word for divorce is "Talaq" which literally means "freedom" or undoing of knot". When defined in terms of law it means snapping-off the nuptial tie once, with express or implied words, by husband personally or through agent or delegate making it effective instantaneously or consequentially.[20]

The word Talaq (divorce) in Shariah means terminating with explicit or implied words the bond created by marriage contract. Divorce has been generally classified into irrevocable and revocable. In irrevocable divorce the marriage contract does not dissolve till the

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20. *The Durr-ul-Mukhtar*; English Translation by B.M. Dayal, P.117. (1992) Kitab Bhawan, New Delhi.

period of probation (Iddat) is over. Ibn Human in his famous book, Fath al-Qadir calls divorce an act of terminating the bond created by marriage contract by express or implied words or by another means, for instance, by Qadi's decree. Divorce is described in Durr-ul-Mukhtar as the act of terminating with the explicit words instantaneously through irrevocable divorce or consequentially through revocable divorce, the bond created by marriage contract.[21]

As it has been pointed out that before the advent of Islam, Talaq or divorce among the Arabs was very easy and was the order of the day. A husband was allowed to pronounce the divorce as often as he pleased. Whenever his relation with his wife were strained, he pronounced the divorce and then reunite as and when it suited him. As there was not limit to this, it was repeated over and over again. The wife could neither have conjugal relations with him nor was she free to marry any one else. However, the Islam and its Holy Prophet (PBUH) looked upon these serious social evil customs of divorce common in Arabian society with extreme disapproval and regarded their practice as calculated to undermine the foundation of the society.[22]

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21. Dr. Tanzil-ur-Rahman; A code *of Muslim Personal Law*, P.309, Vol.Ist (1978) Karachi, Pakistan.
22. Supranote 6, P.62.

It was, however, not possible under the existing social condition to abolish the long standing customs of divorce suddenly overnight. Therefore Islam instead of abolishing them entirely retained some of them by effecting necessary reforms. Accordingly, Islam recognising their necessity allows the couples to separate in the cases of extreme necessity when the marital relations have been poisoned to a degree which makes a peaceful home life impossible. But Islam does not believe in unlimited opportunities for divorce on frivolous and trivial grounds, because any undue increase in the facilities of divorce would destroy the stability of family life. Therefore, while allowing divorce on genuine grounds, Islam has taken great care to introduce checks and balances designed to limit use of available facilities in the following words of Holy Qur'an.

> *"A divorce is only permissible twice;*
> *After that the parties should hold together*
> *On equitable terms or separate with kindness*[23]"

Thus, the divorce under Shariah is a means to untie the subsisting bond of marriage between husband and wife, the right of which has been given to man and woman both to obtain a release from the marriage bond in cases of absolute necessity. Therefore, the husband and wife are absolutely free in the use of this right and no

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23. Holy Qur'an; II: 229

authority has any power to take it away from them unless they are unjust and unfair. Apart from the above Qur'anic injunction the Holy Prophet (PBUH) has made it clear that Islam does not regard divorce desirable.

Muharib reported the Apostle of Allah saying;

> *"Allah did not make anything lawful more abominable to Him than divorce*[24]

Hazrat Ibn Umar reported the Prophet (PBUH) as saying:

> *"Of all the lawful acts the most detestable to Allah is divorce*[25] ".

The Holy Prophet (PBUH) again said:

> *"If any woman asks her husband for a divorce without some strong reason, even the smell of Parodies will be forbidden to her* [26]

Thus, although absolute right to divorce has been granted to man but he is allowed to have a resort to it when all the avenues of reconciliation are closed. Therefore Holy Qur'an enjoins a man to keep his wife even if he does not like her. The Holy Qur'an to this effect says:

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24. *Sunan Abu Dawud;* English Translation with explanatory notes by Prof. Ahmad Hasan, vol. II P.585 (1985). Kitab Bhawan New Delhi.
25. Ibid.
26. Ibid.

"And retain them (the wives) kindly;
Then if you hate them,
It may be that you dislike a thing while
God has put abundant good in it[27]

The family relations play an important part in the social life of a community and their preservation and maintenance is essential. Therefore, Islam has done everything possible to maintain the family and in case of dispute between husband and wife it recommends reconciliation through their representatives. This is last effort to keep them together. The Holy Qur'an says:

"If ye fear a breach between them twain,
Appoint (two) arbiters, one from his family,
And other from hers; if they wish peace
God will cause, their reconciliation[28]".

Through the instant Holy verse, Islam tries to appeal to the conscience of its followers by exhorting, 'You should live with them (wives) in an honourable manner even if you dislike them it is possible that Allah may bring much good to you through that very thing which you dislike. Islam, therefore, permits divorce as a last resort, when all efforts of peaceful living between the couples miserably fails. Islam exhorts both husband and wife to think a hundred and one times before making final decision of separation

27. Holy Qur'an II: 19.
28. HolyQur'an IV: 35

and it has, therefore, afforded all the possible opportunities for reconciliation and provided ample time to reflect calmly over the pros and cons of the matter. Here it may be pointed out that Islam teaches great respect for this relationship and encourages the parties to keep this relationship alive under every difficult circumstances. Though it gives them the right to separate when it becomes physically impossible to live together, it tries its best to keep them together in the ties of marriage upto the last moment. In fact marriage is not a thing to give away whenever one likes in order to contract another marriage. People who marry whenever they like and divorce are not linked by Allah and His Messenger.[29]

Abu Hurayrah reports that Prophet (PBUH) said,

> *"Marry do not divorce,*
> *for God does not like men*
> *and women who relish*
> *variety in sex matters*[30]".

Thus, the divorce is permitted only when the husband and wife cannot live together in peace and harmony and are determined to separate. This rule is based on a Qur'anic text wherein the husbands have been enjoined "to keep the wife with kindness". Although, it is true that relation between husband and wife do not always remain

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29. *Encyclopaedia of Seerah*; Vol. II, P.663, (1986) Seerah Foundation London.
30. Ibid.

co-ordial, yet Allah's law does not insist that strained relation should continue indefinitely. But even in such cases an attempt is first to be made for reconciliation by referring the matter to the arbitration. According to the spirit of divine law, it is only when disagreement continues and efforts to bring about a reconciliation prove unavailing that the parties may dissolve the marriage.

Judicial separation in which the aggrieved spouse is allowed to live separate from other without the marriage being dissolved is an institution not recognised by Muslim law. The reason for this is that the objects of marriage are not restored by judicial separation, because it may result in immorality which in Islam is an evil far greater than divorce. The Muslim law, while it permits divorce insists that there shall be some guarantee that the husband or wife are not acting from caprice or frivolity or on the impulse of a momentary provocation. For this purpose certain restrictions are imposed by law upon the spouses as to the right to dissolved their marriage. First, as regards the dower they have bestowed on their wives, they are not permitted to withholds it or take back anything from it, if they decide upon the divorce. Secondly, a divorce pronounced at a single sitting does not have the effect of final separation. It is laid down as a condition that a divorce, to take legal effect, must be pronounced three times at intervals of one month each. Another condition laid

down for husband intending to divorce their wives is that they should not pronounce the divorce during the period of their wives menstruation. The object of these restrictions is to ensure that spouses should not act in haste, such as, under the influence of wine, anger, excitement, and like, and that an opportunities provided to the parties for rapprochement. This cautious attitude towards divorce from the basis of the Talaq al-sunnah under which marriage is terminated only after a minimum period of three terms of wife's menstrual courses from the time of the pronouncement of divorce. During this period, husband has option to take the wife back[31].

The above discussion makes it clear that a Muslim husband cannot justly divorce his wife in the absence of reasonable grounds and without having recourse to an attempt at reconciliation. It is unfortunate that this basic principle regarding divorce has been lost sight of an divorce given capriciously and without any justification, whatsoever, is considered good in law, though it is strongly discouraged in Islam. This conception of law ignores the strong condemnation and disapproval of divorce in Islam and has led many a husband to make an unscrupulous use of his power to divorce. This often results in great misery and unhappiness for the wife and has made marriage insecure and wife's position very precarious.

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31. Ibid P.664.

Procedure of Divorce in Shariah:

Marriage is an agreement to live together as husband and wife and when either of the party finds it impossible to live with the other, divorce may follow. It is not, of course, meant that every disagreement between them would lead to divorce, it is only the expression of disagreement of the parties to live any more as husband and wife. In the Holy Qur'an such disagreement is called *shiqaq* which means breaking into two. Even Shiqaq does not entitle either party to a divorce, unless all possibilities of reconciliation have been exhausted. The principle of divorce is, therefore, described in Holy Qur'an thus:

> *"If ye fear a breach between them twain;*
> *Appoint two arbiters; one from his*
> *family and other from hers; If they wish*
> *peace, God will cause, Their reconciliation:*
> *For God hathful knowledge,*
> *And is acquainted with all the things*[32].

In this verse, a plan has been put forward for settling dispute between husband and wife. The divine law recommends that a sincere effort should be made to effect a reconciliation before resorting to a court of law or making final breach. The plan is to appoint one arbiter from the family of each spouse for the purpose.

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32. Holy Qur'an; IV:35.

The two should probe into the real cause of the dispute between the parties and then try to find a suitable way out of it. Of course, the relatives are best qualified person, as they know the true conditions of the spouses[33].

The above verse of the Holy Qur'an provides not only the cause of divorce, which is shiqaq or a disagreement to live together as husband and wife but also the process to be adopted when a rupture of marital relation is feared. The expression, "a breach between the two...." imply that either the husband or wife wants to break off the marriage agreement, and hence either may claim a divorce when the parties can no longer pull on in agreement. In the process to be adopted, both husband and wife are to be represented on a status of equality, an arbiter has to be appointed from his people and another from her people. The two are told to try to remove the differences and reconcile the parties to each other. If agreement cannot be brought about, a divorce will follow[34].

There is a difference of opinion regarding the powers of arbiters. According to Imam Abu Hanifa and his disciples as well as Imam Shafai, and Imam Ahmad b. Hanbal, the arbiters are not authorised to pass any final decree but may recommend measures for

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33. Mohd. Iqbal Siddiqui; *The Family Laws of Islam*, P.216, Ist ed., (1988) Delhi.
34. Ibid.

reconciliation which may be accepted or rejected by the spouses. They base their opinions on the ground that divorce lies in the hands of the husband hence the marriage can be dissolved only if he gives this power to the arbitrators. If he does not invest the arbitrator or arbitrators with this power then he or they can not wield it and cannot dissolve the marriage. This is also opinion expressed in Bayan al-Qur'an by Maulana Ashraf Ali Thanvi[35].

According to Ibn Abbas, Sayeed bin Jubair, Ibrahim Nakhai, Muhammad bin Sirin and some other Jurists, arbiters have full authority to enforce their decision about reconciliation or separation whichever they consider to be proper. Ibrahim Nakhai has gone to the extent to hold that arbiters can even pronounce a irrevocable (Mughalazah) divorce. Imam Malik is reported to have held same opinion. The Jurists who are in favour of the proposition that arbitrators have authority to separate or not to separate the parties base their views on the reasoning that God Almighty has called the arbitrators as Hakam (Judge) and such persons namely, Judges have absolute authority in all matters and here it includes the power to separate the spouses[36]

35. Ibid. P.217.
36. Ibid.

Hazrat Uthman and Hazrat Ali (Allah be pleased with them) used to authorise the arbiters appointed by them with full powers to effect reconciliation or separation as required by the circumstances. For instance, when the case of Aqil son of Abu Talib, and his wife Fatima, daughter of Utba bin Rabia, was brought before Hazrat Uthman as to the undesirable behaviour of her husband, The Caliph Uthman appointed Ibn-Abbas as an arbiter from the family of the husband and Muawiyah bin Abu Sufiyan from the family of wife to decide the case. It is also reported by Ibn Abbas that Uthman, the third caliph had directed the arbitrators that they could maintain the marriage or dissolve it as they thought best under the circumstances. They proceeded to the house of spouses and Ibn Abbas remarked that he would separate her (from her husband) but Muawiyah said," I am not such as to cause separation between two descendants of Abd Manaf, that is, he would not separate the two members of his won tribe[37].

There is still a much more weighty and clear authority regarding the instant matter. It is reported that a husband and his wife and some other persons approached Hazrat Ali, the fourth Caliph, who enquired of them what mater was. He was informed that there was a quarrel between the spouses. Caliph Ali quoted the verse of Qur'an about the appointment of arbitrators and asked them if

37. Ibid.

they would abide by verdict of the arbitrators. The wife said that she would abide by injunction in the Holy Qur'an but the husband said that he would not agree to separation if so decided by arbitrators. Caliph Ali thereupon said, "Thou art a liar (that is, at fault in not accepting the injunction of Holy Qur'an), thou can not leave this place until and unless thou also agree to abide by decision of arbitrators as has been done by the woman.[38]

This shows that arbiters as such do not possess judicial powers, but if at the time of their appointment, the authority concerned empowers them with Judicial powers their decision shall be binding and enforced like other Judicial decisions.

The breach of marriage agreement may arise from many causes or from the conduct of either party; for instance, if either of them misconducts himself or herself or either of them is consistently cruel to the other or; as may sometime happen, there is incompatibility of temperament to such an extent that they cannot live together in marital agreement. At first sight it may look like giving too much latitude to the parties to allow them to end the marriage contract, even if there is no reason other than incompatibility of temperament, but this much is certain that if there is such disagreement that the husband and wife cannot pull on together, it is better for themselves,

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38. Supra note 24, P.589.

for their offspring and for society in general that they should be separated rather than they should be compelled to live together. Therfore, when the marriage of two persons has broken down beyond any repair and they have finally decided to separate for good from each other, even under such circumstances, they cannot just say goodbye and leave each other. There is a prescribed procedure for divorce which must be followed by them[39].

The Holy Qur'an explains this in the following words:

"When ye divorce women;
Divorce them at their prescribed periods;
And count (accurately) their prescribed periods;
And fear Allah, your Lord
And turn them not out of their houses;
Nor shall they (themselves) leave,
Except in case they are guilty
of some open lewdness, Those are
limits set by God;And any who
transgresses the limits of God,
Does verily wrong his (own) soul thou
Knowest Not if perchance god will
bring about there after Some new situation[40] ".

Again the Holy Qur'an says:

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39 The *Glorious Qur'an*; The Translation and commentary by Abdullah Yusuf Ali, P. 1563, II ed. (1977), American Trush Pulication Canada.

40 *HolyQur'an* LXV:1

"Then, when they fulfil their term appointed,
Either take them back on equitable terms or part
With them on equitable terms; and take for
Witnesses two persons from among you, endued with
Justice, and establish evidence (as) before God[41] ".

According to the above verse, the first point is that the divorce should be pronounced in the period of purity when menses are over. It has two important reasons. Firstly, during menstruation women becomes irritable and tense due to physiological changes. It is forbidden to divorce a wife in consequence of a marital rift arising during her menstruation. Secondly, during the period of menstruation, the marriage partners are cut-off from that physical intimacy which is the main source of their mutual attraction and adhesion. When the difficult and disturbed period is over, it is possible that with the resumption of sexual relations tender emotions will prevail and resentment which inclined the husband to divorce will melt away.[42]

The second point is that the pronouncement of divorce should be spread over three periods (three monthly courses) and then the final decision should be made whether one is prepared to take her back or one has decided to bid her good-by forever. It also appears

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41. *HolyQur'an* LXV:2
42. *Shahih Muslim*; English Translation by Abdul Hamid Siddiqi, vol. II, P.755,(1978) Kitab Bhawan New Delhi.

from the above mentioned verse of the Holy Qur'an that if a divorce takes place, it becomes irrevocable only after prescribed time and that no divorce is valid if not made revocable within the prescribed time. In other words, a wife can be taken back for sexual embrace within prescribed time but not beyond it. It is also clear that before the expiration of the fixed time, no divorce is irrevocable. Now what is the time prescribed for making a divorce irrevocable, it is three courses in case of menstruating and consummated women[43].

Further, the procedure for pronouncing divorce and at the same time giving sufficient time an opportunity to the two parties to seek reconciliation and avoid any hasty action, is laid down in detail in the Surah *Al-Baqarah* of the Holy Qur'an as follows:

> *"Divorced women shall wait concerning themselves*
> *for three monthly periods; and it is not lawful for*
> *them to hide what god hath created in their wombs;*
> *If they have faith in god and the last day. And*
> *Their husbands have better right to take them back*
> *In that period, if they wish for reconciliation*
> *And women shall have the rights similar to the*
> *Rights against them, according to what is equitable;*
> *But men have a degree of advantage over them*[44]".

During this period of waiting, the husbands are enjoined to keep their wives in their houses so that the state of pregnancy

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43. Ibid.
44. Holy Qur'an, II:228

becomes clear and no doubt is left in regard to the fatherhood of the likely born child. Secondly, both the parties are given a time limit to reconsider the consequences of the permanent separation within this time of three monthly courses and ponder hundred and one time before taking the hard final step. It may be Allah might create a healthy situation for their reconciliation in this way.

So far as the meaning of the expression the prescribed time of waiting is concerned it is merely a period of temporary separation during which conjugal relationship may be re-established. Thus, the period of waiting is only a chance given to the couple for reunion and to make divorce revocable before prescribed time is reached. Here it has been distinctly stated that divorce is revocable within prescribed time. It has been corroborated by the following verse of the Holy Qur'an:

> *"A divorce is only permissible twice;*
> *After that the parties should either hold*
> *Together on equitable terms or separate*
> *With kindness. It is not lawful for you*
> *To take back Any of your gift (from your wives)*
> *Except when both parties fear that they*
> *Would be Unable to keep limits*
> *Ordained by God*[45] *".*

It means that husband must make his decision final after the completion of two divorces and before the completion of third divorce within which he should take back his wife. That is only

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45. Holy Qur'an; II; 229

possible in case there is time of two courses or two months to consider. This verse was meant to reform a serious social evil common in Arabia before advent of Islam.

Urwah b. Zubair said that formerly the custom was that a man divorced his wife and when iddat should be at the point of ending, he took her back and so repeated the process over and over again, even though he had to pronounce the divorce a thousand times. A man behaved so with his wife. He divorced her and when period of Iddat was drawing to an end, he took her back, divorced her again and said; By the lord, I shall neither unite with you nor let you unite with anybody else. The Lord then revealed this verse: (II 229 of Surah al-Baqarah) "divorce is twice". At its end either the woman should be taken back according to the custom or sent away according to custom. From that time onwards people started divorce in new way, those who had divorced and those who had not. As a result, this verse of the Holy Qur'an also shuts the door to cruelty. Accordingly, during his whole married life, a husband may use the right of divorce and reunion with one wife only twice. After that, whenever, he pronounces divorce for third time, wife shall be separated from him permanently[46].

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46. *Imam Malik Muwatta*; Translated with Exhaustive notes by Prof. Muhammad Rahimuddin, P.264, (1981), Kitab Bhawan New Delhi.

The Holy Prophet (PBUH) explained the procedure of divorce in very clear words:

"If and when it becomes inevitable, it should be pronounced only when she is just free of the menstruation and there has not been sexual intercourse with her since, and there should be two witness for the divorce. However, if a dispute arises during the period of the menstruation, it is not lawful to pronounce divorce during that period, but the husband should wait for her to cleanse herself and then may pronounce a single divorce, if he so wishes. Then he should wait for the next monthly course and pronounce the second divorce after she is cleansed, if he so wishes. Then he should wait for next monthly course to pronounce the third and final divorce after she is cleaned. It is however, better to wait and reconsider the matter after the first and second pronouncement for, in the case of two pronouncement the husband retains the right to take her back as his wife after their expiry. But if divorce is pronounced third time, the husband forfeits the right to take her back"[47]

Therefore, during the period of first two pronouncements of divorce, the Muslim husbands are commanded in verse quoted above (65:1-2) to keep their wives in their house during the waiting periods and not to turn them away. They are required to live together as

47. Supra note 29, P.664.

formerly. It is just possible that living together may bring them closer and help in their reconciliation if the husband has acted hurriedly and in a fit of passion. Then they are also forbidden to divorce when their wives are in the state of menstruation but must wait, and when they are purified then if they intend to carryout their heart's desire, pronounce a first divorce, and then a second divorce when she is purified after her second month's menstruation. And a final divorce can be pronounced after the purification of the third month's menstruation. This long procedure is laid down for divorce by the Islamic law to give the two parties sufficient time to think and resolve their differences and try to reach some agreement, because after the third pronouncement they will have no chance for reconciliation[48].

Abdullah Ibn Umar reported that he had divorced his wife while she was in the state of menstruation during the life time of Allah's Messenger. Umar bin al-Khatab asked Allah's Messenger about that. Allah's Messenger said, "order him (your son) to take her back and keep her till she is clean and then to wait till she gets her next period and becomes clean again, whereupon, if he wishes to keep her he can do so and if he wishes to divorce her, he can divorce before having sexual intercourse with her; and that is prescribed

48. Ibid., P.665.

period which Allah has fixed for woman meant to be divorced.[49]"

Another tradition states that Prophet told Ibn Umar to observe following procedure in divorcing his wife:

> *"Ibn Umar, "said the Prophet, 'you adopted a wrong method. The right one is that you should wait for tuhr (period of cleanliness), then pronounce a divorce during one and another during the second. During the third you should decide finally either to retain your wife or to divorce her. Ibn Umar said, O' Messenger of Allah, If I had given three divorces at one and same sitting, had I right to take her back"? No, she would have separated from you, but it would have been a sin*[50].
>
> *Mahmud Ibn Labid reported that when Allah's Messenger was informed about a man who had divorced his wife by declaring it three times without any interval between them, he arose in anger and said, "Is sport being made of the book of Allah who is great and glorious while I am among you"*[51].

The above quoted traditions make it clear that simultaneous pronouncement of three divorces is a sin because it is against the wisdom of the law of shariah and it also exceeds the limits of Allah which the believers are told to honour and respect.

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49. *Sahih Al-Bukhari*; Translated by Muhammad Mohsin Khan: Vol. VII; P.129; (1984) Kitab bhawan New Delhi.
50. Ibid.
51. Ibid.

Concluding the discussion it may be said that every possible attempt must first be made for reconciliation between the married couples before the completion of the prescribed period. In order to check hasty action and leave the door open for reconciliation of many stages, the right method of pronouncing divorce is as laid down in the Holy Qur'an and the traditions, i.e. if and when it becomes inevitable, it should be pronounced only when she is completely free from her menstruation and is in clean state and even if a dispute arise during monthly period, it is not lawful to pronounce divorce during that period. He should wait for her to cleanse herself and then should pronounce a single divorce, if he so likes. Then the wife should be left to observe Iddat.

Professor Tahir Mahmood has summarised the Qur'anic procedure of divorce in the following words:

The law of Islam says to the husband[52]:

a) Talaq is "worst of all permitted things" (Abghad ul-Mubahat); better avoid it; but if you find it necessary to have recourse to Talaq, then;

Wait till the wife enters the period of tuhr, i.e. when she is not in her menstrual period (this will assure that you are not acting in a haste);

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52. Tahir Mahmood: *The Muslim law of India*; P.115 (1980) Central Law Agency Allahabad.

During that period pronounce Talaq and do not make it irrevocable (bain) by your words;

1. Revoke the Talaq, if possible, before the expiry of wife's Iddat;
2. If you have exercised your power of Talaq in this way, your behaviour has been the best.
3. If you do not revoke it by that time at the expiry of Iddat the marriage shall stand dissolved.
4. Now you can not revoke the Talaq at your pleasure; but after the expiry of her Iddat you can remark the same woman with her consent.

b) If you have revoked the Talaq pronounced by you for the first time, never pronounce it again since it is same "worst of all the permitted things". However, in case you find it necessary to pronounce Talaq once again, then;

1. Avoid it until once again wife is free from her menstrual period;
2. Pronounce Talaq in her tuhr;
3. Do not by your words, make also this second Talaq irrevocable;
4. Try to revoke this second Talaq before the expiry of wife's Iddat;
5. If you do not revoke it by then, at the expiry of wife's Iddat the marriage will, once again, stand dissolved;

As before, now you can not revoke the Talaq at your pleasure, but after the expiry of her Iddat you can remarry the same woman with her consent.

If you have succeeded in preparing yourself to revoke the Talaq (which you pronounced for a second time), never pronounce a Talaq again "since it is worst of all the permitted things"; but again if you really find it unavoidable to pronounce a Talaq, then;

1. Wait for wife being once more free from her menstrual period (this will give you a last chance for a cool consideration);
2. Know that if you now pronounce a Talaq (for third time) you cannot revoke it any more, also you will not be able even to remarry your divorced wife right way; if you so wish you will have to pay a penalty which, due to human nature, you will never like the penalty of finding your wife in somebody else's bed and remarrying her only if and when she is lawfully free of marital bond; the penalty is known as 'Halala',
3. The moment you do so the marriage will stand dissolved.
4. If you have exercised your power of Talaq in this way, your behaviour is still good (Hasan);

You can not, however, contract a fresh marriage, right way, with your divorced wife. If you so desire, pay penalty of Halala and

fulfil your desire; but this you can not do by collusion with your divorced wife and the man she remarries after Iddat, any such collusion will make penalty wholly ineffective; only if third person marries your divorced wife without any pre-conditions, consummates the marriage, and then divorces her willingly and not with intention of making her available to you, with her consent you can take her back by a fresh marriage.

This is the simple procedure of divorce in Islam which is unfortunately misunderstood by the majority of Muslims themselves due to their ignorance.

Recognised Forms of Divorce:

Before entering into a general discussion on Talaq with its various forms, it would be pertinent at the outset to summarise a few cardinal aspects regarding it. Legally speaking the concept of Talaq as evolved by jurists differs from the western dissolution of marriage known as divorce, since it is essentially a procedure that can only be initiated by the husband, no consent of the wife is required. Besides, the exercise of Talaq is extra-judicial and in no way subject to external check. Technically, therefore, power of the husband to divorce is considered absolute.

In view of the injunctions of Holy Qur'an and traditions Talaq may be pronounced either in Ahsan or the Hasan, from, known as the

Talaq-us-Sunnah which offer opportunities for revocation or re-establishing the status of marriage and are, therefore 'Rajai' (revocable). On the other hand, 'Bidat' or irregular form can be implemented by a triple pronouncement, clearly indicating finality by the use of some expression, thus terminating the relationship totally, and is technically called Bidat (irrevocable). Hence, once such a pronouncement is made the status of marriage cannot be restablished except by resorting to the doctrine of Halala[53].

However, the Talaq or divorce by a Sunni husband may conveniently be discussed under the following heads;

1. Talaq-al-sunnat; and
2. Talaq al-BIddat.

Talaq al-Sunnat:

Divorce according to the rules of tradition (Talaq al sunnat) is that divorce which is pronounced in the manner and in the time frame prescribed by the Holy Prophet (PBUH). Pronouncing such a divorce however does not mean that it is an act of piety that it shall entitle one to the reward of a virtuous act. Divorce in itself is not an act of devotion that reward of a virtuous act may be expected out of it. Talaq al sunnat only means that a divorce pronounced by that

53. The term Halala means that a man who has given a final divorce to a woman cannot remarry her until she has entered into a marriage with second man and that second man having enjoyed sexual intercourse with her and divorce her willingly.

procedure has the approval of the Holy Prophet (PBUH) and his companions and the pronouncing of divorce contrary to that manner is procedurally disapproved and is sinful.

According to Hanafi Jurists, there are two modes of pronouncing Talaq al sunnat, which is of two kinds:

a) Talaq-e-Ahsan (most approved form of divorce)

b) Talaq-e-Hasan (Proper form of divorce)

Talaq-e-Ahsan (Most approved form of divorce):

Talaq-e-Ahsan is the most approved form of divorce. The words "most approved" do not denote any intrinsic merit of this kind of divorce. What is meant is that kind of divorce is least disapproved of its various forms. The reason for the preference of this form of divorce over others is that it does not immediately sever the marital relationship but allows an opportunity to the spouses to continue the marriage if they so choose and in pursuing this method, the husband can still exercise his right without the necessity of an intermediary marriage to retain his wife by a reversal of the divorce during the period of her Iddat, if he be so inclined[54].

This rule is based on an injunction in the Holy Qur'an which states:

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54. Supra Note 2, P.198.

"A divorce is only permissible twice;
After that, the parties should either hold,
On equitable terms, or separate with kindness[55] ".

It is laid down at another place in the Holy Qur'an;

"So if the husband divorces his wife third time (irrevocably), he can not after that, remarry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they reunite, provided they feel that can keep limits ordained by God. Such are the limits ordained by God, which he makes plain to those who understand[56]

This form of repudiation is also referred to as a sughra form, being technically 'Rajai' or revocable and its legal after-effect is that the man has the capacity to remarry his wife after the period of Iddat has expired and repudiation complete, without her having to contract and consummate another marriage with a different man. It should be noted that this is the only form of repudiation which invokes reconsideration on the part of both parties. Such a divorce is not pronounced when the husband is prevented from having intercourse with his wife only due to her courses. It is a positive abstinence of conjugal relations on his part. During the period of Iddat, the parties have the time to reconsider their decision so that if the pronouncement is not revoked there is sufficient reasonable

55. Holy Qur'an; II, 229.
56. Holy Qur'an: II: 230.

indication that it was not made in haste. Besides, remarriage between the parties is possible, and in case of death of either parties, during Iddat, the other is in a position to inherit. Also wife's menstruation after which there has been no sexual intercourse, assures the husband of her not being pregnant. Finally, such a divorce can be effected three times during a person's life time. All the Sunni as well as Shia Schools accept this form of divorce as being most laudable or the least dis-approved[57].

By this pattern of divorce, a man gives his wife a single reversible divorce within a Tuhr, a period of purity, the period which intervenes between menstrual course, during which he has not had physical relations with her. The divorced wife is left to observe the period of Iddat unles revoked in the meantime. The repudiation becomes final on the expiry of the prescribed period of Iddat, which in the case of divorce is three menstrual periods or if it cannot be ascertained, then on the expiry of three months and in case of pregnancy, until the delivery of her pregnancy. The Iddat period for a widow is four months and ten days while there is no Iddat for a woman who get divorced before consummation of her marriage. During the Iddat period, the husband is free to revert to his wife.

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57 Supra note 3, P.199.

Even on the expiry of Iddat period, he has option of taking her back by marriage, an option that is not available in triple divorce or three divorces in one sitting.[58]

It has been recommended by the Holy Qur'an in Surah Talaq Ayat four (LXV: 4) that the husband while divorcing his wife or while reverting to her during the Iddat period or while marrying her a new after Iddat period should keep two virtuous witnesses to these acts. Such a procedure of divorce being Ahsan keeps the option of reunion open to the couples. It is unfortunate that Muslims have abandoned this mode of divorce which is safest and also holds a sea of benefits and it has been recommended as the best way of divorce by the Holy Prophet (PBUH). The long three months of Iddat period in this form of divorce affords high chances of reconciliation between couples that is why this type of divorce is most laudable.[59]

The companions of Holy Prophet (PBUH) too favoured this mode and held in high esteem those who gave no more than one divorce until the end of Iddat, as they held this to be a better pattern than Talaq-e-Hasan. The self respect of couple is also maintained in this type of divorce. Even a cursory examination of this mode of divorce reveals that the system of divorce has been regulated to

58. Safia Iqbal: *Women and Islamic law*: P. 187, Ist ed. (1991) Adam Publishers, Delhi.
59. Ibid. P.188.

safeguard the interest of woman, discarding all possibilities of divorce being given in haste or anger by the husband[60].

Talaq-e-Hasan:

The Talaq-e-Hasan or laudable divorce, the second form of Talaq, is also approved though it is the second best mode, the most preferable being the Talaq-e-Ahsan. The Talaq-e-Hasan is effected when the husband pronounces three separate sentences of divorce in three successive period of tuhr or purity. This implies that he pronounces a single sentence of divorce to his wife in a period of purity or tuhr, then a second sentence of divorce after a month in a second tuhr, and the third sentence of divorce again after a month in third tuhr or purity. When the last repudiation is pronounced, the divorce becomes irrevocable, or the status of marriage is permanently dissolved. In other words, if husband pronounces one divorce at the beginning of one tuhr, pronounces a second divorce at the next tuhr after her second monthly period, and, subsequently, pronounces a third divorce at third tuhr, the divorce becomes irrevocable or the status, of the marriage is dissolved permanently[61].

The legal effect after a third pronouncement is that the marriage stands dissolved and husband can not revoke his decision to retain his wife since divorce now operates as Talaq-e-Mughallaza, or

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60. Ibid.
61. Supra note 3, P.199.

thick divorce creating Baynuna-e-Kubra or a big gulf. Therefore, in case he wishes to remarry her after the final pronouncement, he can only do so if she subsequently goes through another marriage with a different man which is consummated and subsequently validly dissolved. This process of undergoing another marriage is legally known as Halala. Talaq Hasan is accepted by all Sunni schools as well as Shia school.[62]

An important observation regarding Talaq-e-Hasan as generally interpreted is herewith brought to the notice by Dr. Tahir Mahmood. He says, generally, Talaq-e-Hasan is commonly misunderstood. It is believed that in this mode of divorce three Talaq must be given in three successive or consecutive tuhr periods when the wife is not in her menses. This, we submit, is wrong. He then describes the correct legal procedure, in the words of Maulana Ashraf Ali Thanvi from his well known book Bahesti Zewar." A person pronounces a revocable divorce. He then reconciles and resumes cohabitation. Two or four years later, under provocation, he once again pronounces a revocable Talaq. On recovering from provocation, he again resumes cohabitation. Now two Talaq are over. Hereafter, whenever, he pronounces a Talaq, it will be counted as third Talaq which will dissolve the marriage forthwith, and a remarriage if desired by parties, necessities Halala. Nevertheless, he

62. Ibid.

concedes that though husband has pronounced Talaq once, which he should do in tuhr but he can do so still later at any time during the subsistence of marriage, and whenever he does so, the Talaq will be counted as a second Talaq. Similarly with other two pronouncement. The point of time when Talaq becomes irrevocable is the time when the right of inheritance also cease. Thus in Hasan form it ceases with third pronouncement.[63]

The Islamic records bear out that both Talaq-e-Ahsan and Talaq-e-Hasan are approved form of divorce. However, there is no disagreement about Talaq-e-Ahsan being a divorce in accordance with the rules laid down in tradition of the Holy Prophet (PBUH). The Hanafi Jurists base their opinion on the following verse of the Holy Qur'an:

> *"O 'Prophet, when ye do divorce women,*
> *divorce them at their prescribed periods*
> *And count (accurately) their prescribed periods,*
> *And fear god your Lord*
> *And turn them not out of their houses,*
> *Nor shall they themselves leave,*
> *Except in case they are guilty of some*
> *Open lewdness. Those are limits set by God.*[64]

Again, the Hanafi Jurists in support of their interpretation of the instant Holy verse cite the incident of Abdullah Ibn Umar. He

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63. Ibid. P.200.
64. Holy Qur'an LXV:1

divorced his wife in the state of her menstruation. Hazrat Umar consulted the Holy Prophet about this act of his son. The Holy Prophet (PBUH) expressing his anger said," Abdullah has contravened sunnat (method, mode) ordained by Allah and added that proper mode of divorce is that which you pronounce in each period of purity."[65]

All Sunni Imams other than Imam Malik hold that Talaq al-Ahsan and Talaq-Hasan are both Talaq al-Sunnat i.e. divorce according to the tradition. According to Imam Malik, to pronounce one divorce in each of the terms of purity, (i.e. the Hasan procedure) is also an innovation. Pronouncement of one divorce by the husband is the only divorce according to the Prophet's tradition, because divorce, in fact is prohibited. It is permissible only in case of necessity of getting rid of the wife and purpose is served by pronouncement of one divorce only. Hence, divorce according to the tradition in the opinion of Imam Malik, is that which is pronouned revocably once by the husband to his wife in the term of her purity in which he has not cohibited with her, and she is left alone during her term of probation of three menstruations, and during these periods no further divorce need be pronounced. According to Imam Malik it is essential for Talaq al-Sunnat that no further divorce during the term

65 . Supra note 49, P.129.

of probation be pronounced. The basis of his assertion is that the divorce, according to the tradition (Talaq al-Sunnat), is that which is pronounced for carrying out a set purpose. The purpose is carried out by the pronouncement of one divorce. Hence, the pronouncements of second and third divorce in second and third terms of purity being unnecessary are abominable. Likewise, the pronouncement of all the divorces at a time, according to Imam Malik, are abominable, in as much as the first divorce having taken effect the second and third divorces are superfluous being unnecessary.[66]

Thus, both these forms of divorce, namely Ahsan and Hasan, provide safeguard against the effect of hasty action by the husband and allow him an opportunity to undo the harm caused by his act of divorcing the wife by cancelling the same and to continue his marriage.

Concluding Remarks:

The brief historical facts as to the evolution of institution of divorce discussed above establish adequately that Islam is not breeder of the institution of divorce. It has existed in all the ancient human civilization. The Hebraic law, the Authenians, the Romans, the Shammites and others upheld this doctrine in various forms. But in all social system, the husband was the predominant authority with

66. Supra note 21, P.315.

no efficient check on his power. The Christian and Jews also recognised this institution. Islam simply tolerated it in the larger interest of the society but only after effecting necessary reforms. It gave woman certain rights of the divorce which were not given by any legislature. At the same time, it puts a check on divorce by saying; "Of all the things allowed, the most abominable to Allah is divorce".

The institution of Divorce in Islam is a means of dissolving the contract of marriage in abnormal circumstances. This dissolution is possible only in a contractual form of marriage but not in its sacramental form as in Hinduism. According to latter, marriage is the sacred union of two souls for life, whether there is agreement or disagreement between the couple or whether the husband oppresses the wife or not. Divorce becomes a necessity when the husband and wife are not pulling on well for a length of time. It is sheer foolishness to keep them tied up in matrimonial bond when it is unpleasant to both. It rather enhances the suffering of couples and their children rather than increases their happiness. Therefore, it is a natural law that dissatisfied couple should be separated from the marriage tie for the welfare of the house-hold, children and society. In instituting this doctrine of divorce, Islam did more good to women as men may take several wives in case of disagreement with the first

wife but a woman can not do so. If a husband is impotent, or if a wife or husband generally resorts to adultery, it is a nuisance to keep them tied up in marriage bond specially when all efforts to bring about a compromise prove unavailing. If the husband or wife becomes permanently diseased or unfit for sexual intercourse, Justice demands a divorce.

Therefore, the idea underlying the institution of dissolution of marriage seems to be that parties should be allowed to separate from each other when marriage fails in its objects and the parties cease to fulfil their mutual obligations. To compel them to live together in pursuance of the requirements of law would indeed be unfair, and it might sometimes, lead to appalling consequences.

Allah and His Prophet (PBUH) in fact, do not like the dissolution of marital tie but permit it as a remedy of social and moral evils in genuine and Justifiable circumstances. A careful study of Holy Quran and Ahadith clearly demonstrates that Islam stands for reconciliation between spouses rather than severance of their matrimonial relations.

Instead of encouraging termination even in extremely genuine cases, Islam recommends a continuation of marriage and enjoins the spouses to make adjustments and to tolerate each other inspite of shortcomings and defects in each other, for the sake of family and

society. But Islam does not regard marriage bond indissoluble. In this regard, the attitude of Islam has been realistic right from the very outset, and not like the unrealistic approach of other religious and socio-legal systems which had to come to terms with reality subsequently by not only recognising divorce but also by facilitating it. Islam taking into consideration the frailties and fluctuation of human nature, recognises divorce. The permission is, however, given with reluctance.

In permitting dissolution of marriage Islam has provided realistic solution to the problem of an incompatible marriage resulting in interminable quarrels and general happiness which defeats the very object of this sacred institution i.e. marriage.

While permitting termination of marriage Islam does not believe in unlimited opportunity for divorce on frivolous and flimsy grounds because undue increase in facilities of divorce would destroy the stability of family life. Therefore, while allowing divorce on genuine grounds, Islam has taken great care to introduce check and balances by prescribing procedure of divorce, obligation of dower and maintenance, provision of "Tahlil" contract designed to limit the use of available facility.

CHAPTER - III

TALAQ-AL-BIDDAT: CLASSICAL VIEWS AND JUDICIAL TRENDS

It is that form of divorce which is considered from the religious point of view a Biddat. It is so called because it does not command the sanction of Shariah as well of the Muslim Jurists and is considered undesirable innovation. Any divorce, which does not conform to Talaq al-Sunnah is deemed to be an innovation or Biddat and is, therefore, called Talaq al-Biddat. It is highly condemned, disapproved and even declared sinful but nevertheless it is considered legally effective. The practice of Talaq-al-Biddat is traceable even in the time of the Holy Prophet (PBUH). There is a well-known case of Abdullah Ibn Umar who had divorced his wife during the period of menstruation. The Holy Prophet (PBUH) on being informed of this told his that he had acted wrongly and advised him to cancel the divorce and then to proceed in the proper manner if he still persisted in his desire to divorce his wife. The fact is that Holy Prophet (PBUH) strongly condemned Biddat form of divorce and did not sanction it even tacitly at any point of time in either form. But in the course of time, it came to be considered a valid and legal form of divorce. Moreover, it assumed many other forms in second century and came to be recognised as an effective divorce[1].

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1. K.N. Ahmad; *The Muslim Law of Divorce*: P. 67, (1984), Kitab Bhawan, New Delhi.

The most prevalent method of exercising Talaq al-Biddat under the Sunni law now-a-days is to pronounce three irrevocable Talaq at the same time in the same period of Tuhr and is commonly called "Triple Talaq". As its name suggests, it is an irregular or heretical form of divorce and is not approved by the Holy Qur'an and Sunnah and is considered an innovation within the fold of Islam. It is most disapproved form of divorce. It is highly disliked and condemned being declared to be sinful even though its prevalence is tolerated and same is considered legally effective in practice[2].

Hidaya defines it as a divorce where husband repudiates his wife by three divorces in one sentence or where he repeats the sentence separately thrice within tuhr. Thus he may pronounce, I divorce you, I divorce you, I divorce you or he may say, I divorce you thrice[3].

It is, however, not necessary that the husband should repeat the pronouncement three times in order to constitute triple divorce. The triple repetition is only one of the many forms by which a divorce can be effected and the same result can be obtained by other method recognised for the purpose. A husband can effect such a Talaq by only one pronouncement if he makes it clear that he was pronouncing a Talaq al-Bain, that is, a irrevocable divorce. Thus, to effect such a Talaq the husband may say you are repudiated thrice. He can only convey his intention of pronouncing

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2- Dr. Zeenat Shaukat Ali: *Marriage and Divorce in Islam;* An Appraisal, P. 200, (1987); Jaico Publishing House, Bombay.

3- *The Hedaya*; Translated by Charles Hamilton; Vol. 1, P. 73 (1985) Kitab Bhawan, New Delhi.

three divorces by saying, "You are divorced so many times and by showing three fingers at the same time which will result in Talaq al-Biddat. In this form of Talaq after pronouncement, if parties wish to reunite, they cannot do so till the wife undergoes Halala i.e. wife goes through another marriage which is consummated and subsequently dissolved. This condemned form is considered heretical because of its irrevocability. It is considered good in law, though bad in theology and is most commonly practiced in India[4].

This has been a customary form of divorce in pre-Islamic Arabia. Neither does the Holy Qur'an mention this form nor does it seems to have been recognised or sanctioned by the Holy Prophet (PBUH) who, on contrary strictly disapproved it.

According to Ameer Ali, "Talaq-al-Biddat or triple divorce, as its name signifies, is heretical or irregular mode of divorce which was introduced in the second century of the Islamic Hijri era. It was then that the Ommeyyad monarchs, finding checks imposed by the Holy Prophet (PBUH) on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of law and found in the pliability of the jurists a loophole to effect their purpose [5].

According to Asghar Ali Engineer, the Islamic Shariah which was formulated more than hundred years after the death of Holy Prophet

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4. Ibid.
5. Syed Ameer Ali: *Muhammedan Law*; Vol. II p. 435, (1986), Kitab Bhawan, New Delhi.

(PBUH) and have evolved under the complex influence of various civilization took away what was given to the women by the Holy Prophet (PBUH) and Holy Qur'an. The issue of triple divorce in one sitting illustrates this very well. It was practiced during the Jahilliyah (time of ignorance) before the advent of Islam. The usual practice then was to pronounce talaq two times and withhold third pronouncement making the wife's live in constant fear of the third utterance [6].

Triple divorce was not allowed during Prophet's (PBUH) lifetime, during the first Caliph Abu Bakar's reign and also for more than two years during the second Caliph Hazrat Umar's time. Later on Hazrat Umar permitted it on account of a peculiar situation. When the Arabs conquered Syria, Egypt, Persia etc. they found women there much more beautiful than their own women and hence were tempted to marry them. But those women who were not knowing about Islam's disapproval of triple divorce in one sitting, would insist that before marrying them they should pronounce divorce thrice to their existing wives which they would readily accept to do (as they new Islam had abolished triple divorce and that it would not be effective) and marry the Syrian or Egyptian women and would also retain their earlier wives. When the Egyptian and Syrian women discovered that

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6. Asghar Ali Engineer: *Islam and Women*; The Indian Express. 5th August (1993) New Delhi.

they had been cheated, they complained to second Caliph Hazrat Umar. The Caliph then enforced triple divorce again in order to prevent its misuse by the Arabs. He had done so to meet an emergency situation and not to enforce it permanently and to contravene express provisions of Holy Qur'an and saying of Holy Prophet (PBUH). But later Jurists declared this form of divorce valid and gave religious sanction to it.[7]

The reason for legitimizing this form of divorce by Caliph Hazrat Umar seems to be restrictive rather than permissive. He held it permissible to impose certain restriction on loose tendencies to divorce which had crept in during his regime. Hazrat Umar's object in making effective three divorces pronounced on one occasion was to warn the people that they would have to take evil consequences of following an un-Islamic practice but the result was contrary to what he intended. Henceforth, it became a general practice to pronounce divorce thrice on a single occasion dissolving the marriage immediately and irrevocably. It is this aspect of divorce which has created misconception regarding the pronouncement of divorce, along with the legal effect of it becoming irrevocable, either by three pronouncements at a single sitting or three pronouncements at three tuhrs of single Iddat seems to have crept into Islamic Jurisprudence, and is a matter grave enough to require serious study at length.

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7. Syed Khalid Rashid: *Muslim Law*: P.22: 3rd ed., (1996), Eastern book Co. Lucknow.

Effect of Triple pronouncement:

There is a great controversy regarding the effect of triple pronouncement of divorce at one and same time. The difference in the opinions of Islamic scholars is due to difference in their interpretation and application of the law. One set of the Jurists are of the opinion that no leniency should be shown in application of the law so that people should not take undue advantage on that account. The Hanafi Jurists, therefore, hold three repetitions of divorce to be final and effective with immediate effect.[8]

The other set of Jurists are of the view that Allah wants not to create hardship and people should be dealt with leniently and every possible effort should be made to minimise the chance of separation. So they are of the view that three pronouncements of one time should be counted as one divorce. Ibn Rushd is also of the same view as Islam approves the golden means. Thus, he has not allowed the husband to revoke his divorce on indefinite occasions. Had it done so, the husband could harass his wife by every time revoking divorce before the expiry of period of Iddat. Similarly, if every divorce amounted to an irrevocable divorce then it would have involved hardship to the husband as he would get no opportunity of revoking the divorce. He then concludes that to hold three repetitions of divorce at one and the same time to amount three divorces is to lose sight of

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8. Ibn Rushd; *Bidayat al-Mujtahid*; Vol.II; P.61, cited by K.N. Ahmad; *The Muslim Law of Divorce*, P.85 (1984). New Delhi.

the policy of Muslim law. Another category of the Jurists are of the view that if second and third pronouncement were made merely to emphasise the first pronouncement, then only a Ghair Mughallazah or revocable divorce shall be effected. They apply the same rule when the second or even third pronouncement was made under a momentary excitement without the intention to pronounce a Mughallaza divorce. However, other category of the Jurists are of the view that Mughallaza, a final divorce shall be effected as soon as the third pronouncement is made irrespective of the fact whether it was made intentionally or unintentionally or merely to emphasise the first pronouncement.[9]

In view of the vexed controversy, it is necessary to look into the original sources of Islamic Jurisprudence Qur'an, Ahadith, Ijma scholastic thoughts as well as Judicial stand point to resolve the controversy as to the effectiveness and validity of triple pronouncement in one and same sitting.

Holy Qur'an:

Holy Qur'an, the paramount source of Islamic Jurisprudence, has not ordained that the three divorces pronounced in a single breath would have the effect of three separate divorces. To this effect the relevant verse of the Qur'an can be relied upon:

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9 Ibid.

"A divorce is only permissible twice;
After that, the parties should either hold
Together on equitable terms or separate with
Kindness."[10]

The use of the Arabic term "Marratane" in this verse does not mean repeating it but effecting the divorce on two separate occasions. As it is explicit by the apparent meaning of the verse that even after two pronouncement of divorce on two different occasions, the chances for retaining the wife is very much open before the pronouncement of the third divorce on separate occasions. Virtually this third pronouncement of divorce makes divorce irrevocable and the chance for retention comes to an end. While some jurists are of the view that word Marratane means mere repetition of word talaq thrice or uttering three number of talaq to indicate the purpose of effecting divorce.[11]

Therefore, the instant verse (II:229) establishes that three divorces pronounced at one time does not amount to irrevocable divorce. In Qur'an there is no trace that the "three divorce" pronounced at one occasion would be treated as three divorce on irrevocable footing. Scholars have gone to the extent that the verse relating to the matter of three divorce is a definite and express enjoinment on the subject that Mughallaza divorce will happen only when three divorces are pronounced one after another on different occasions.

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10. Holy Qur'an; II:229
11. Dr. Mohd. Shabbir: *Muslim Personal Law and Judiciary*; P.198; (1988), Law Book Co. Allahabad.

Hence on the basis of Qur'anic materials as analysed above, it may be concluded that only one divorce in effect results from the three pronouncements at one occasion.

Ahadith:

The view that mere repetition of divorces without an intention to give a Mughallaza or final divorce or simply by way of emphasis or in momentary excitement does not amount to a Mughallaza or final divorce finds full support from the following traditions.

> *"Mahmud bin Labeed reports that the Messenger of Allah was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said; Are you playing with the Book of Allah who is great and glorious while I am still amongst you? So much so that a man got up and said; shall I not kill him.*[12]

If the repetition were permissible having the effect of final divorce, then it is not clear as to why Prophet (PBUH) should have been so angry. The reaction of the Holy Prophet (PBUH) bears the testimony of what Allah has ordained in His Book, 'Divorce is permissible only twice before third and final divorce'.

There is another tradition reported by Rokanah-b. Abu Yazid that he gave his wife Salmah an irrevocable divorce and he conveyed it to the

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12. *Mishkat-ul-Masabih*: An English Translation & commentary by Al-Haj Maulana Fazlul Karim: P.693 (1981). Islamic Book Service, New Delhi.

Messenger of Allah and Said; by Allah, I have not intended but one divorce. Then Messenger of Allah asked have you not intended but one (Divorce)? Rokana said; by Allah, I did not intend but one divorce. The Messenger of Allah then returned her back to him. Afterwards he divorced her for second time at the time of Hazrat Omar and third time at the time of Hazrat Osman".[13]

The instant tradition leaves no doubt that if a person pronounces one divorce upon his wife and then repeats the divorce a second or even third time simply to emphasis the first pronouncement and not with a view to effect Mughallazah or final divorce, it shall be open to him to explain his intention and to take back his wife; otherwise how could the wife have been asked by Prophet (PBUH) to return to her husband.

It is, thus, clear from the above discussion that during the Prophet's (PBUH) time and for a period after him, such cases of triple divorce wherein pronouncing divorce husband swore to his intention of divorcing only once, were termed as cases of single divorce and couples were reunited. During Caliph Omar's time when people started misusing this facility and indulged in widespread triple divorce, reverting back to the wife after swearing to their intention of giving a single divorce, Caliph, Hazrat Umar decreed that triple divorce would become effective, refusing to allow the couples to revert to each other since the facility of oath taking

13. Ibid., P.690.

had been turned into a meaningless game by many. The object of Caliph Umar in treating it as a Mughallazah divorce was clearly to stop people from wanton repetitions of divorce and from treating the matter of divorce in a light and non-serious way. It must have suited the needs of his own time, but practice in the modern times has resulted in a great deal of harm. People in the excitement of moment give three divorces to the wife at one and same time without least intention to pronounce a Mughallazah divorce but simply to emphasise the first pronouncement, a step which they grievously repent afterwards when they find that mischief cannot be undone.[14]

Juristic View:

Imam Abu Hanifa holds that three pronouncements shall amount to three separate divorces and they shall result in a Mughallazah or final divorce. The explanation that the husband had used the three pronouncements simply for the sake of emphasis cannot change the nature of divorce and a Mughallazah divorce would be effected. This is also the view held by majority of the Hanafi Jurists who hold that in such a case Mughallazah divorce would be effected and would be good in law and bad in religion. The expression "good in law" means that it will be given effect by a Qazi or Court. Ibn Taymiah holds that if a husband does not repeat the divorce three times, but says "I divorce you three times or thrice" or uses

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14 Safia Iqbal: *Women and Islamic* Law; P.187; 1st ed. (1991). Adam Publishers, New Delhi Delhi.

some similar expression then the pronouncement shall amount to only one pronouncement of divorce and so shall be a non-Mughallazah divorce. Ibn Ishaq, Tawus, Akramah and Ibn Abbas hold that three pronouncement of divorce at one and same time constitute only one divorce.[15]

Imam Muslim, the author of Sahih Muslim recorded a tradition from Ibn Abbas which reads:

> *"The divorce by three pronouncements at a time was considered a single divorce during the time of Apostle of Allah (PBUH), and of Abu Bakar, and in first two years of the caliphate of Hazrat Umar. Hazrat Umar said; The people make haste in the matter in which they were given time to consider would that we made them operative. So he made them operative i.e. he made three pronouncements of divorce as three divorce".*[16]

This tradition indicates that a divorce by three pronouncements at a time is considered a single divorce. However, Hazrat Ibn Abbas later on withdrew his opinion and held that three pronouncements make three divorce and not one. As his opinion is contradictory, it will not be taken into consideration only the tradition narrated by him on this subject shall be considered.

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15. Fatawa; Ibn Taymiah: vol. III, P.141, cited by K.N.Ahmad: *The Muslim Law of Divorce* P.86 (1984), Kitab Bhavan, New Delhi.
16. *Sahih Muslim*: Translated by Abdul Hamid Siddiqui, Vol. II, P.759, (1978), Kitab Bhawan, New Delhi.

It is also reported that Hazrat Umar used to punish people who pronounce three divorces at the same time. This also supports the view that he wanted to discourage people from this course of action. The Sunni Jurists who consider three pronouncement to amount three or final divorce have explained that in those days people did not actually mean three divorces but meant only one divorce and other two pronouncements were meant merely to emphasis the first pronouncement. But in contemporary era three pronouncements are made with the intention to effect three separate and distinct divorces, hence it can not be counted as one divorce. But this interpretation of the Hanafi Jurists is generally not acceptable as it goes against the very spirit of procedure of divorce as laid down in the Holy Qur'an as well as Ahadith which enjoin that in case of breach between husband and wife it should be referred to the arbitration and failing an amicable settlement, a divorce is allowed subject to a period of waiting or Iddat during which a reconciliation is possible and husband can take back his wife. The main idea in the procedure for divorce, as laid down by Islam, is to give the parties an opportunity for reconciliation. If three pronouncements are treated as a Mughallazah divorce, then no opportunity is given to the spouses or the husband to retrieve a hasty divorce. This rule was introduced long after the time of Prophet (PBUH) and it renders ineffective the measures provided in the Holy Qur'an against the hasty

action thereby depriving people of a chance to change their minds, retrieve their mistakes and retain their wives [17]

Imam Malik regarding effectiveness of triple divorce makes a distinction between various expressions used in the pronouncement of divorce. A husband in the process of pronouncement of divorce may use the word as when he ways, I divorce you and divorce you and divorce you". He may, on the other hand, not use it as when he says, "I divorce you, divorce you, divorce you". The pronouncement in the former case shall amount to three divorces or Mughallazah or irrevocable final divorce. But in the latter case the matter can, according to Imam Malik, be considered from the following three aspects[18]:

(a) When the husband merely repeats the words "you are divorced" three times or as when he says" you are divorced, divorced, divorced". In such a case if husband explains that he had repeated the words three times merely to emphasise the divorce then his explanation that he had repeated the divorce to make it more emphatic would not be accepted.

(b) If the husband did not repeat the words to lay emphasis but intended three divorces or repeated the words without any intention at all then three divorces shall be effected. If the husband pronounces three

17. Supra note 1, P.89.
18. Ibid , P.90.

divorces on different occasions but in the same tuhr, then same result shall follow.

(c) In case of conditional divorce, the explanation regarding the intention of the husband is acceptable. However, triple divorce shall be effected on the fulfillment of the condition.

Imam Ahmad Ibn Hanabal lays down the following rules regarding the effectiveness of triple divorce.

If the husband does not use the word "and" in the process of repetition as when he says, "you are divorced, divorced, or I divorce you divorce you and second and third pronouncements are used simply for emphasis then only one divorce shall be effected if the marriage has not been consummated. If the marriage has been consummated then three divorce shall be effected.[19]

If the conjunctive word "and" is used by the husband in the process of pronouncements of divorce, i.e. you are divorced and divorced and divorced in such a situation if second and third pronouncement are used only to emphasis the first pronouncement only single divorce would be effected irrespective of fact whether marriage has or has not been consummated. However, if triple divorce is used without intention to

19. Ibid., P.91.

emphasise first pronouncement, one Mughallazah divorce or final irrevocable divorce shall be effected

According to Imam Shafi'i if a marriage has been consummated and the husband repeats three pronouncements of divorce against his wife whether using or without using a conjunctive word like "and" but without intending three divorces and merely to lay emphasis on the first pronouncement a single divorce shall be effected. If he pronounces three divorces intending or without any definite intention, three divorces shall be effected. If the marriage has not been consummated then only one divorce shall be effected under such circumstances.[20]

According to Shia law, there is general consensus that triple divorce at one time will be counted only one divorce though it is pronounced in several numbers and Imamia sect of Shia has faith that such divorce is no divorce.[21]

The well known Islamic Jurist, Maulana Abdul Hayy of Lucknow opines that triple divorce would be counted as a single and revocable divorce [22]

Allama Aieni expressed his view in favor of triple divorce pronounced at one occasion to be counted as single one in effect.[23] Allama

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20 Ibid
21 Ibid
22 Abdul Hayy, *Umdat-ur-Reaya*, Vol II. P 71, cited by Dr Mohammad Shabbir, supra Note, P 205
23 Al-Aieni Badruddin Mahmood, *Unidatul Qari Sharah Bukhari* cited by Dr Mohammad Shabbir, supra note 11, P 205

Aloosi in his commentary Roohul Maani[24] describes that in this matter (Triple divorce) Imamia and some individuals of Ahl-i-Sunnat Wal Jamat like Allama Ibn Tyymiah and his followers are opposed to the followers of Imam Abu Hanifa.

Noted theologian, Shaikh Mohammad Thanvi opines that the Qur'anic words "At talaq Marratan", means that one divorce should be followed by the other (second divorce). Therefore, the legal divorce is that which is pronounced at different occasions in different tuhr and not at a time in a single sitting.[25]

Recently, in an unparallel decree the Jamiat-Ahle-Hadith, an apex non-political religious body of Muslim religious scholars, has declared the pronouncement of "three talaqs" at one sitting as invalid and in effective. Sounding a death-knell on the triple divorce concept, the historic fatwa issued by three Muftis of the Jamiat, Sheikh Ataur Rehman Madani, Sheikh Ubaid-ur-Rehman and Sheikh Jamil Ahmad Madani have decreed that if a Muslim husband pronounces "Talaq, Talaq, Talaq, Talaq" to his wife at a single sitting, it will not be considered a divorce under Shariah and will not in any manner affect the rights and obligations of both husband and wife. The Muftis, quoting extensively from Holy Qur'an, Hadith and Sunna ruled that if the husband pronounced three talaqs in a row, they would be De-Jure considered as a single talaq which was revocable under shariah. The

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24. *Roohul Maani*, Vol. II, P.137, cited by supra note 11, P.206.
25. Marginal note of *Nasaai*, Vol. II. P.29.

remaining two other talaqs will be null and void and will amount to "making a mockery of the Qur'an and sunna. The legal consequence of such talaq, treated as one, was only that spouses had to abstain from sexual intercourse but if the husband resumed cohabitation, the talaq would be treated as revoked and couple would be entitled to stay together, the Muftis said.[26]

Mufti Mohammad Mukharram Ahmad, the Shahi Imam of the Fatehpuri Mosque of Delhi, too believes that Muslims must follow the Islamic pattern in divorce cases than what has been the trend and says that the Ahle-Hadis people have done something that ought to have been done much earlier.[27]

Commenting on the pronouncement of three talaqs at one sitting by the Muslim husbands, an eminent scholar of Islamic law, Prof. Tahir Mahmood said it was playing havoc with the lives of the thousands of women in India, due to its purported irrevocability. He said though triple talaq at one sitting was treated as valid by Hanafi Jurists, it needed change in keeping pace with the modern times and the scope could be found in other schools[28]

It has been pointed out that many Hanafi Jurists hold that a divorce takes effect if it is pronounced three times even at a single sitting. To buttress their stand points, the following Ahadith are cited.

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26. The Hindustan Times, (Sunday Magazine), July 18, (1993) New Delhi.
27 Ibid.
28 The Hindustan Times; PTI report, July 9 (1993) (New Delhi).

> *"It reached Malik that a person told Ibn Abbas, I gave my wife a hundred divorces. What is your opinion about me? Ibn Abbas said; three divorces made her absolutely bain to you and by remaining ninety seven divorces, you have made fun of verses of Allah".*[29]

Another Hadith to this effect is that it reached Malik that a person went to Abdullah bin Umar and said I have divorced my wife two hundred times. Ibn Masud asked; what did people tell you? He replied:

> *"They told me that my wife stands absolutely divorced. Ibn Masud said; It is true. The man who divorces as the Lord ordains, the Lord hath pointed out the ways, and for him who makes a mess, he will have to bear the evil consequences. Do not confuse things so that trouble may ensue. Your wife has become cut-off from you.*[30]

But noted Islamic Jurists, Imam Ahmad Ibn Hanabal, Imam Taymia and other like minded scholars reject this opinion and regard as one pronouncement to three declarations of divorce delivered at a single sitting; so that separation does not come-off at the end of three such declaration, but only when they are separated each by an interval of one month. There are strong grounds supporting the stand taken by Imam Ahmad bin Hanabal and Ibn Taymia. In the first place it is obvious that intention of law in prescribing three pronouncements of divorce, separated by fixed intervals of time precedent to final parting, was to leave open room for reconciliation.

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29. *Muwatta Imam Malik*, Translated with exhaustive note by Prof. M. Rahimuddin, P.425. (1981) Kitab Bhawan. New Delhi.
30. Ibid.

This intention is defeated by recognizing three pronouncements delivered at a single sitting, of having effect of final separation. Secondly, there is sufficient evidence to show that the companions of Prophet (PBUH) regarded this form of divorce in one sitting as being morally reprehensible and involving the person in great religious sin.[31]

Writing in 1943 the Jamat-e-Islamic chief Maulana Abul A'Ala Maududi said;

Separating a woman instantly by simultaneous pronouncements of three divorce is a sinful act on the basis of explicit Qur'anic mandates. There exists some difference of opinion among Jurists as to whether three instantaneous divorces amounts to a single reversible divorce. But all agree that act amounts to an innovation and is a sinful. All declare that this mode of divorce run contrary to the mode prescribed by Allah and His Messenger (PBUH). He suggests that to put an end these evil practices, it seems necessary that effective restrictions must be placed on the three simultaneous divorces so that people may find themselves restrained from this hasty act. He further opines that the act is not only sinful but also punishable.[32]

It is crystal clear from the above that firstly, triple divorce is not a proper divorce and even not based on Qur'anic injunctions. Secondly,

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31. The Hindustan times (Sunday Magazine) July 18, (1993), New Delhi.
32. Maulana Abul A'Ala Maududi, *The Laws of Marriage and Divorce in Islam*. pp.105-106, (1989), Markazi Maktaba, Delhi.

Hazrat Umar made it a bain talaq on the basis of conditions prevailing at that time. It is noteworthy that Hazrat Umar made it a penal crime and used to flog such persons. He said that a person who commits such a bain talaq commits a sin. This showed that he had never encouraged triple divorce. It is submitted that now the time has changed and in present condition it is better to follow the ruling laid down in the Holy Qur'an and traditions reported from Holy Prophet (PBUH).[33]

Now the question arises what should be done if a person happens to pronounce three divorce in single sitting? What is the remedy for such a situation. Here is the following solution to this distortion of true Islamic law of divorce. It has now come in the form of a refreshing Fatwa (Juristic verdict) from some Indian theologians which provides:

If a man who has pronounced triple talaq, says he did it either in ignorance of law or merely to put emphasis on his words, his marriage remains intact until the expiry of his wife's Iddat. During this period he can unilaterally revoke the Talaq. If he has not done so within that time, later he can remarry her with her consent. This interpretation of the law in fact restores the reforms effected by the Holy Prophet (PBUH).

Maulana Mujahidul Islam Qasimi of Bihar was first to adopt it. Now

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33. Dr. Saleem Akhtar; *Shah Bano Judgement in Islamic perspective* (A socio-legal study) P.103, 1st ed. (1994), Kitab Bhawan New Delhi.

it has been accepted by Mufti Zafeeruddin of Darul Uloom of Deoband.[34]

Moreover, following is the text of the resolution adopted in a seminar held in Ahmadabad from 4 to 6 November, 1973 under the Presidentship of Mufti Ateequr Rehman in which following, among others, persons were present.

Maulana Saeed Ahmad Akbarabadi, Maulana Mukhtar Ahmad Nadvi, Maulana Syed Urooj Qadri, Maulana Syed Hamid Ali, Maulana Abdul Rehman bin Ubaidullah Saheb Rehmani, and shams Peerzada.

After prolonged discussion and deliberation, following resolution was adopted unanimously which was later published.[35]

i) Three pronouncements of divorce in one and same sitting resulting in Mughallazah divorce is not based on Ijma (consensus) and therefore is not final. It has been controversial since very beginning.

ii) If a person says to his wife talaq, talaq, talaq and thereafter says that his intention was to pronounce only one talaq and he says that he had used the word talaq three times for merely emphasising it, then this will not be taken Mughallazah, (irrevocable) divorce.

iii) If any person says to his wife, I divorce you thrice' but he states on oath that his intention' was not to pronounce three divorce, he

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34. Tahir Mahmood; *No more Talaq, Talaq, Talaq; Juristic Restoration of The True Islamic Law on Divorce*. XIII. C.L.R.,P.11. 1992. New Delhi.
35. Ibid.

thought that without three pronouncement divorce will not be effective, so he made three pronouncements. In such a situation, this statement will be accepted and the divorce will not be considered as Mughallazah.

The resolution further stated that there is an urgent need to educate the Muslim masses about correct procedure of divorce and tell them that three pronouncements in one sitting is an innovation (Biddat) and oppression against women. Muslim should avoid wrong procedure of divorce.

Judicial Recognition :

As far as judiciary in India is concerned it has so far, barring few exception, tolerate the triple divorce. In British India as well as in Independent Indian all the courts are declaring triple pronouncement of divorce in one sitting as lawful and effective. The common phrase used by court is that the Talaq-e-Biddat or triple pronouncement of divorce is good in law though bad in theology. The triple divorce is recognised and endorsed by the Indian Judiciary.

The Bombay High Court in Sara Bai v/s Rabia Bai[36] recognised triple divorce on irrevocable footing. In the stance case one Haji Adam Siddiqui with two witnesses approached Qazi and before him he pronounced talaq in absence of his wife. Talaqnama was prepared by Qazi

36. ILR (1905)30 Bombay 537.

and it was duly signed by all concerned and step was taken to hand over her Iddat allowance with the communication of talaq. But she managed to make the same. Haji Adam died very soon. His divorced wife filed a suit assuming herself wife of Haji Adam for maintenance and residence, but the Bombay High Court refused to accept her contention and held above referred talaq on irrevocable footing. It was held that talaq being absolute it was effective as soon as words were written even without wife's receiving the writing. Justices Bachelor held that it (divorce) was good in law, though bad in theology. After quoting Ameer Ali, he further observed;

The author of Multeka (Ibrahim Halebi) is more concise. He says, the law gives to the man the primarily the power of dissolving marriage if the wife by her indocility or her bad character renders the marriage life un-happy, but in the absence of serious reasons no Musalman can justify a divorce either in the eyes of religion or the law. If he abandons his wife or puts her away for simple caprice, he draw upon himself the divine anger, for, the curse of God, said Prophet (PBUH) rest of his who repudiates his wife capriciously.

Using separate sentence:

Allahabad High Court in *Ameer Uddin v/s Khatoon Bibi*[37] held that if husband pronounced divorce by using three separate sentence at once

37. A I R 1917, Allahabad 343.

occasion, same fall in the category of the Talaq-ul-Biddat and becomes irrevocable. In this case Mst. Khatoon Bibi filed a suit for the recovery of dower, maintenance and movable properties in possession of her husband. She was lawfully married to Ameeruddin and lived as wife upto 18th September, 1913. It was pleaded that Ameeruddin divorced his wife at Railway Station at Allahabad when she was going to Mahoba to her parents against the wishes of her husband. But the husband rebutted the advocacy of the wife and the words used to utter divorce at railway station did not amount to irrevocable divorce in the eye of Islamic Law of divorce and he had option to revoke the same and he had exercised within the prescribed time. But this plea of the husband was not acceptable to the court of law.

On the authority of Ameer Ali the court observed:

"The Talaq-ul-Biddat, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century at the Ommoyyad era. It was then that the Ommoyyad monarchs finding the check imposed by the Prophet (PBUH) on the facility of repudiation looked about for some escape from the strictness of the law and found in a loophole to effect their purpose. As a matter of fact the capricious and irregular exercise of the power of divorce which was in the beginning left to the husband was strongly disapproved by the Holy Prophet (PBUH). It is reported that when once news was brought to him that one of his disciples

had divorced his wife pronouncing the three talaq at one and same time, the Holy Prophet (PBUH) stood up in anger on his carpet and declared that the man was making the plaything of the words of God and made to take back his wife".

Opinion of the Privy Council:

In *Saiyida Rashid Ahmad v/s Mst. Aneesa Khatoon*[38] the court recognised triple divorce pronounced at one time as validly and effective. On the law at divorce under Islam, the judicial committee at the Privy council has made the following observation.

"The divorce called talaq may be either irrevocable (bain) or revocable (rajie). A talaq bain always operates as an immediate and complete dissolution of marriage bond, differ as to one of its ulterior effect according to the form in which it is pronounced. A talaq bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage either (a) once followed by abstinence from sexual intercourse for a period called the Iddat, or (b) three times at shorter intervals or even a immediate succession or (c) once, by words showing a clear intention that the divorce shall immediately become irrevocable. The first named of the above method is called Ahsan (best), the second Hasan (good), the third and fourth are said to be Biddat (sinful), but are

38. AIR 1932, PC. 25

nevertheless regarded by Sunni lawyers as legally valid and effective".

In the instance case Ghiyasuddin divorced his wife Aneesa Khatoon by the formula of "triple divorce" in the absence of her but in presence of witnesses. After four days, he executed Talaqnama stating that he had divorce his wife in abominable form. Later on they started living as husband and wife and there was no proof for the compliance of doctrine of Halala. Five children were born to the couple and Ghiyasuddin treated them as legitimate. The Privy Council agreed with the observation of the lower court that by pronouncement of triple divorce at one occasion become effective in breaking the marriage tie then and there.

Presence of Wife on declaration:

Whether the presence of the wife is essential at the time of divorce was answered by the Madras High Court in Aisha Bibi v/s Qazi Ibrahim[39] . The court held to this effect that where the words of divorce addressed to the wife, though she was not present, were repeated three times as I divorce for ever and render Haram for me which clearly showed an intention to dissolve the marriage, and followed it by executing a deed for divorce which stated that three divorces were given in the abominable from i.e., Biddat, the talaq being addressed to the wife by the name and in the Biddat from, the presence of wife is unnecessary.

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39. (1910)3, Madras 22

The Calcutta High Court in *Fulchand v/s Namal Ali* [40] held that presence or absence of wife makes no difference so far as effectiveness of triple divorce is concerned. The court speaking through Justice Subba Rao observed:

"We, therefore, hold that it is not necessary for the wife to be present when the talaq is pronounced. Triple divorce to be effective, it is imperative that it should be addressed to the wife in particular sense".

Innovative Opinion:

In Ahmad Giri v/s Mst. Megha [41] the court observed that the Talaq-ul-Biddat is most prevalent form of obtaining divorce in India. Any change in this respect can not be brought about by judicial interpretation. If there is a general desire among the Muslims to revert to the pristine of Islam, how such changes in the present state on Muslim Law can be brought out, in the words of Syed Amir Ali, "whether by general synod of Muslim doctors or by the direct action of the legislatures, it is impossible to say.

In *Yusuf v/s Sowramma*[42] justice Krishna Iyar made a significant observation regarding divorce. He observed that it is popular fallacy that a Muslim male enjoys under Qur'anic law unbridled authority to liquidate the marriage. The Holy Qur'an expressly forbids a man to seek pretext for divorcing his wife so long as she remains faithfully and obedient. He

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40. (1911)36 Calcutta 184.
41. AIR 1955 J & K 1.
42. AIR 1955 J & K 1.

further observed about the state of affairs in India, that Muslim law as applied in India has taken a course country to the spirit of what the Holy Prophet (PBUH) or the Holy Qur'an laid down and the same misconception vitiates the law dealing with the wife's right to divorce.

Ziauddin case:

In Ziauddin vs Anwary Begum[43] the Guahati High court delivered a revolutionary judgment in which justice Baharul Islam, after a threadbare consideration of several previous privy council and high courts judgement on triple divorce, laid down a correct law by extensively quoting the injunction of Holy Qur'an and relevant Hadith. He held that other decisions were neither correct nor in consonance of Islamic Shariah. Despite of judicial limitations and binding force of decisions of privy Council he endeavored to present a correct approach of Muslim law of divorce in accordance of with the sprit of Shariah and removed the distortion committed by earlier judges in this area He further observed that there has been a good deal of misconception of institution of divorce under Muslim Law. Both from Holy Qur'an and Hadith it appears that the divorce was permitted, yet the right could be exercised under exceptional circumstances.

Rahmatullah Case:

In Rahmatullah v/s State of UP and others [44] Justice, H.N. Tilhari of

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43. 1978 (Unreported) Criminal No. 1999, of 1977, Quoted by Dr. Saleem Akhtar: *Shah Bano Judgement in Islamic Perspective*, P. 114, 1st ed. (1994), Kitab Bhawan New Delhi.
44. 1994 (12) Lucknow Civil decision, p. 463

Allahabad High Court (Lucknow Bench) observed:

"Talaq-ul-Biddat or Talaq-i-Bidai, that is, giving an irrevocable divorce at once or at one sitting or by pronouncing it in the tuhr once in an irrevocable manner without allowing the period of waiting for reconciliation or without allowing the will of Allah to bring about reunion by removing difference or cause of difference and helping the two in solving their differences, runs counter to the mandate of Holy Qur'an and has been regarded, by all under Islam, as sinful. The learned Judge further observed that the mode of talaq giving unbridled power to the husband cannot be deemed operative as same has the effect of perpetuating discrimination on the ground of sex, that is, male authoritarianism. The need of the time is that codified law on Muslim marriage and divorce should be enacted keeping pace with the aspiration of the constitution.

Justice Tilhari cited with approval the following passage of honorable Justice Krishna Iyer.

"Reform of law of marriage and divorce for Muslims as for others must be guided by right principles. In any matter of family law reform, I think there are three clear competing issue all of which have to be weighted. First and foremost, there is strong interest of the society generally that every thing should be done to encourage and maintain stability and performance of family Unit not only for the sake of couples

but also for the sake of children. Secondly, there is public interest in allowing marriage which have hopelessly broken down to be decently and rationally dissolved. Thirdly, there is a public interest that in any matrimonial dispute, justice should be seen to be done so that clearly guilty party should not be permitted to profit from situation which he and he alone had been instrumental in creating. [45]

Although the instant case does not deal with the question of divorce directly as the case related to the UP imposition of ceiling of land holding Act. It was a case relating to land property where husband and wife claimed that there union had come to an end by triple pronouncement. It is an 'obiter dicta' of the judgement and it helps in mobilising public opinion and if it is for a public purpose it must be given some weight.

Recently, the Allahabad High Court upheld divorce by a Muslim husband by citing talaq thrice and that too when his wife was not present there. The husband had arranged for witnesses and communicated to his wife through a letter that she had been divorced after he cited talaq, talaq, talaq for her[46].

From the above discussion it is clear that although judiciary in British India as well as Independent India has declared triple divorce as effective and valid but they have held it on the basis of binding precedent

45. Ibid., p. 465.
46. The Times of India, August 24, (1998), New Delhi.

because of the privy council Judgement in *Aga Mohmmad v.s Koolsoom Bee*[47] where in the court held that it would be wrong for the courts on a point of this kind to put their own construction on the Qur'an in opposition to express ruling of commentators of such great antiquity and high authority. But as we have seen that in majority of the cases the court has either regretted its action or found itself helpless to pronounce verdict in opposition to the earlier rulings. In some cases the court felt the need to reform but did not give verdict against the established judicial dictum that triple divorce is good in law but bad in theology.

Conclusion :

A deep and dispassionate study of the instant topic brings out clearly that separating a woman instantaneously by simultaneous pronouncements of three divorce is not only a sinful act but a flagrant violation of Quranic mandates. There exists difference of opinion among the jurists as to whether three instantaneous divorces amount to a single reversible divorce or three irreversible divorce but all agree that this act amount to an innovation and is a sin. Hazrat Ali declared that this mode of divorce runs contrary to the mode prescribed by Allah and His Holy Prophet (PBUH). This practice strikes at the root of social welfare which the Shariah seeks to promote. The reported Ahadith also clearly establish that this act is not only sinful but also punishable. At present time three instantaneous divorces,

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47. 1897, 24 IA. 196.

under the stress of an emotion, have become a wide-spread practice. As emotion subsides, shame and regret grip the guilty conscious of the man and a search start for some excuse to undo what has been done. Some one takes cover behind false oaths to deny having divorced; another one arranges a spurious second marriage of the wife, followed by divorce and remarriage with himself. To put an end to these evil practices, preventive legislative measures of various kinds have been resorted to by the Muslim countries of the world. In all such countries some pressure has been exerted to introduce reforms whereby attempts at reconciliation are first to be tried, failing which divorce would be effected, safeguarding wife's right. A major reform was introduced in the Turkey where unilateral divorce is not held permissible, only a court can dissolve a marriage, on application of either party to marriage on any ground specified in civil code 1926 and the Turkish Family Marriage and Divorce Law of 1951 respectively. These grounds are adultery, attempt on life or grave injury, infamous crime, or dishonourable conduct, malicious abandonment of marriage, desertion, incurable or long lasting mental disease and intolerable stranged conjugal relations.[48]

In Tunisia, where a unilateral divorce is no more possible and in Algeria where unilateral divorce is possible, the court intervenes and is permitted to dissolve a marriage, either on the ground specified by law or in pursuance of a mutual agreement between the spouses. Over and above,

48. Supra note 2, p.207

under the Tunisian law, court may also grant a divorce when insisted upon by either party In Algeria the court may dissolve a marriage also when unilateral talaq has already been pronounced by husband and is notified to court by him or by the wife [49]

In other states where unilateral divorce is still held valid, certain imposition are placed in its pronouncement In the states of Malaysia and in Singapore intervention of court is essential in divorce proceeding, although the family law does not specify on what ground it might do so. Similarly, in Sri Lanka, a husband may effect a divorce on any ground yet the court intervenes at every stage, insisting on his presence in accordance with its procedure in order to make it effective [50]

The Muslim Family Laws Ordinance 1961 of Pakistan renders compulsory a notice to be given by husband who has pronounced unilateral divorce on the wife. to a local civil official who in turn will constitute an arbitration council The Arbitration council will try to bring about a reconciliation, and if none is possible, the divorce will be effective only ninety days after said notice of divorce had been given In case of pregnant wife the divorce will not be effective until the date of delivery [51]

In India, authors of several books on Muslim law, as also some others, have misunderstood the permissiveness of extra Judicial divorce in

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49 Ibid
50 Ibid
51 Ibid . p 208

Islam and have failed to distinguish between general guidelines for the spouses in matter of divorce and legal requirements for divorce. This has complicated and to a certain extent distorted the Muslim law of divorce. It is this complicated rather partly distorted law which, unfortunately, is Judicially recognised law in many non-Arab countries, including those in Indian sub-continent.

CHAPTER – IV

Part – A

(A) DIVORCE BY KHULA: A PRIVILEGE AND POWER OF MUSLIM WIFE

Conceptual Analysis:

The solemn and sacred divinely ordained covenant of marriage, with the exception of a Muta or temporary marriage permissible under shia law, is envisaged to last for the life time of the husband and wife and the couples are enjoined to make every possible effort to keep their union intact. However, when the relations between the spouses becomes strained and are poisoned to a degree which render their peaceful home life impossible and there is apprehension of being violated the limits (Hudud) of Allah, Allah's law does not allow that the strained relation should continue indefinitely and the spouses are allowed to terminate it in kindness[1].

Therefore, principles of Islamic law relating to the matrimonial relationship is that if the husband and wife live together, they must live with peace, love, Kindness unity, and mutual fidelity from the depth of their hearts, fulfil each other's rights and obligations and treat each other with generosity and liberality. But if this spirit is absent, then their separation is recommended better than the continuance of their union because after the end of love and mercy between them, their marital relationship is like a dead body

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1. *Encyclopaedia of Seerah*: Vol. II, p. 90. (1986) Seerah Foundation London.

which if not buried in earth will endanger their health with its awful smell and poison, as well as. the whole atmosphere of family life that is why whenever the Holy Qur'an explains the matrimonial relationship, invariably it insists on the decent and the Kind behaviour, especially on the part of the husband[2].

Islam does not insist on keeping the unwilling partners tied together despite their mutual hatred and disgust. In such a situation it in their interest as well as in the interest of society that separation be permitted. In this matter Islamic law has maintained a balance between its concern for the demands of human nature and its regard for the preservation of the social good. This balance of right has no parallel in any other law of the world. Islam seeks to make marital tie stronger but unlike Hindu and Christian law, it does not make it unbreakable even if there is fear that upholding the continuance and sanctity of marriage contract will create a danger to the morals, chastity and the married life of the spouses may have degenerated into loath-some intolerable misery. So Islam keeps the emergency doors of separation open for the partners and are allowed to use it in the extreme necessity and emergency. But the doors of separation are not so wide open as it is in present day Russia, U.S.A. and other western countries where marital tie is free from all moral and social restraints[3].

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2 Ibid P 92

3 Syed Abul A'Ala Maududi *The Laws of Marriage and Divorce in Islam* P.36, 1st ed (1989), Markazi Maktaba Islamia, New Delhi

Therefore, just as the man, inspite of the well-known tradition of Holy Prophet (PBUH) (PBUH) "divorce is most hateful-thing of all the lawful things", has been given the right to divorce his wife with whom he cannot pull on, likewise, the woman has also been given the right of Khula for the purpose of upholding the objectives of matrimony enshrined in the Shariah law. Letting a woman to live with a man with whom she is not happy or from whom she does not get satisfaction or is likely to put her in the circumstances in which there is danger of her exceeding limits of Allah is unconscionable and unjust. Therefore, a woman is also given by the Holy Qur'an the right to free herself from the fortress of marriage by giving back some portion or whole of her wealth (Mahr) she received from her husband[4]. This right has been given to her by way of doctrine of 'Khula' and is expressly stated in the divine book, Holy Qur'an[5].

The Holy Qur'an clearly lays down that under the Shariah law both man and woman enjoy equal rights and privileges in all walks of life and is accorded equal status and position in society by Islam. The Holy Qur'an says:

> *"And women shall have rights,*
> *Similar to the rights against them (Men),*
> *According to what is equitable."*[6]

The necessary implication of this verse is that in a given Islamic society both men and women are parallel partners and the

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4- Supra note 1, p. 91
5- See: Infra note 17
6- Holy Qur'an; II: 228.

natural components of a society having the similar rights, social economic, matrimonial and political against one another. A fact often misunderstood is the degree of superiority-Qawwamiat given to men over women in Islam. But this superiority is not due to any increased or exhaulted status of men but is due to their additional maintenance responsibilities towards women. The term Qawwamiat does not in any way suggest that men as compared to women are morally or spiritually on higher plan[7].

It is, therefore, wrongly thought that Islamic matrimonial law has made gender inequality by giving the husband unilateral power of divorce. Whereas the fact is that under the provisions of Muslim law right to dissolve the marriage is not unilateral and vested in husband but this right is bilateral and wife is also given the right to dissolve it in same circumstances and on similar grounds by means of Khula.

Thus, the fortress of marriage can be dismantled either by husband on his own initiative or at the instance of wife or by mutual agreement. In the first two cases there is breach of the implied contract that the marriage will subsist during the lifetime of the parties. If it is husband who is guilty of this breach, he is penalized by becoming liable for the immediate payment of his wife's deferred dower, whereas if it is the wife who wants the termination of

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7- Safia Iqbal: *Women and Islamic Law*; p. 157 1st ed. (1991). Adam Publishers New Delhi.

marriage, she has, as a rule, to compensate the husband. This termination of marriage at the instance of wife is called Khula. It is one of the ways of the dissolution of marriage and has been well recognized from the early period of Islam[8].

It is worth mentioning here that it was Islam that for the first time, vindicated the wife's right to dissolve the marriage and thereby enunciated the theory of gender equality, a right unknown and unthought even to this day in other parallel religious and human civilizations.

Definition of Khula:

The word Khula literally means, "to put off" as a man is said to Khala'a his garment when he puts it off. In law it is demission or laying down by husband of his rights and authority over his wife at her instance on acceptance of compensation by means of word 'Khula'. The release so secured by the wife from the husband from the marriage-tie at her instance, on paying or consenting to pay compensation to him, is called 'Khula'[9].

The word Khula is derived from the Arabic term Khal'un which literally means extracting out one thing from another. Technically, the word "Khula on the line of a vaze means "taking

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8. K.N. Ahmad: *The Muslim law of Divorce*, p.219, Ist ed. (1984). Kitab Bhawan, New Delhi.
9- Ibid. p. 220.

out" or taking off" for instance, "Khala al-Thoub" means "he took off the clothes". Khula in Shariah means that husband after accepting compensation from his wife renounce over his rights and authority under marriage contract[10].

According to Fatawa-i-Qazi Khan[11], "Khula means" to take off" e.g. you take-off your clothes. or take-off your boots and its secondary meaning is to take off clothes. The spouses are garment to each other and when they make Khula, each of them takes-off his and her clothes. Therefore, in Shariah it signifies a relinquishment of rights and authority over his wife by husband dissolving the marital relationship at the desire of the wife in lieu of compensation paid by her to the husband out of her property.

In the famous case Moonshee Buzloor Rehman v/s Lateefun Nisa[12] their lordship of privy council have stated, "a divorce by Khula is a divorce with the consent and at the instance of wife in which she gives or agrees to give consideration to the husband for her release from the marriage-tie. In case of terms of agreement are matters of arrangement between husband and wife the wife may, as a consideration, give up her dower and other rights or make any other agreement for the

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10. Tanzil-ur-Rahman; *A Code of Muslim Personal Law*, Vol. 1st P. 513 (1978) Karachi, Pakistan.
11- *Fatawa-i-Qazi Khan*: Vol. 1st, P. 513. Translated and Edited by Maulvi Muhammad Yusoof Khan (1986), New Delhi.
12- M.I.A. 379, P.C.

benefit of the husband.

Though the Khula without compensation means divorce with its implications. It has attained special meaning in sub-continent of Pakistan and India. The common practice here is that wives renouncing their amount of dower secure separation from their husbands. In other words, Khula in Pakistan and India, amount to obtaining divorce for consideration. In Indo-Pakistan sub-continent, however, even in case of Khula with compensation the word 'divorce' is used. That is to say, the husband instead of saying that he effects Khula (release his wife so and so from his bondage of marriage) says that he divorces her though he ought to use the word Khula instead of word divorce. It is, therefore, essential that the word 'Khula' should be used instead the word 'divorce' in case of release with compensation[13].

Hence, the courts keeping in view the difference between 'Khula' and 'divorce' with consideration should, at the time of dissolution of marriage contract, make the husband to use the word Khula not the word divorce as Khula here means that the husband, on getting compensation from wife and by using the word Khula extinguishes his rights under the marriage contract[14].

In *Ghulam Sakina vs. Umar Bukhsh*[15] it was held that in Khula

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13 Supra note 10; p. 515.
14. Ibid.
15. P.L.D., 1964, S.C. 456.

the marriage is dissolved by an arrangement between the parties for a consideration paid or to be paid by the wife to the husband, it being also a necessary condition that the desire for separation should come from the wife. Where the desire for separation is mutual the divorce is Mubara'at.

When the wife, owing to her aversion to the husband or her un-willingness to fulfil the conjugal duties, is desirous of obtaining a divorce, she may obtain a release from marital contract by giving up either her settled dower or some other property and such a divorce is consequently called Khula. When a divorce is effected by mutual consent of mutual aversion it is called Mubara'at[16].

Thus, Khula is a dissolution of marriage by an agreement made between the parties to the marriage on giving some consideration to the husband for the release of the wife from the marriage tie. The grantor of the release is called Khali and the woman obtaining release the Mukhtalia.

Difference between Khula and Talaq:

The Talaq and Khula, in their nature stand parallel so much that the aim of the both is to end the bond of marriage. Inspite of this fact, there is a difference between the Talaq and Khula in the

16. Syed Ameer Ali; *Muhammad Law*; Vol. II, p. 467,(1986), Kitab Bhawan, New Delhi.

following respects.

(a) A Talaq is pronounced by husband at his own initiative. A Khula is, however, given at the instance of the wife when she has an invincible aversion for her husband and cannot maintain the limits set by Allah.

(b) In divorce the husband becomes liable for the immediate payment of the wife's dower, if deferred and still unpaid, but in Khula it is wife who makes payment to husband in order to persuade him to release her from the marriage-tie and consideration may consists of dower itself.

(c) A divorce can be given only under certain specified conditions. Thus, a husband cannot divorce his wife when she is having her menstrual course nor in the course of purity in which he has been intimated with her. But a Khula can validly be given in such circumstances.

Religious Basis of Khula:

Holy Quran:

Needless to emphasise, the verses of the Holy Qur'an and the Ahadith reported from the Apostle of Allah (PBUH) make it abundantly clear beyond all the doubts and dispute that Islam at first instance tries its best to discourage the dissolution of marriage, especially, on the frivolous and unjust grounds in an arbitrary

has expressed the opinion that the above stated verse II: 229 of the Holy Qur'an means that Allah has made it unlawful for the husband to take back any of the gift given by him to his wife on the solemn occasion of their marriage or at any time after the marriage except the amount of the compensation given voluntary by the wife in lieu of her release from the marriage bond. The ground of effecting Khula is stated to be only apprehension that the spouses shall not be able to maintain the limits ordained by Allah. The verse 229 of the Sura al-Baqar commands that each of the spouse should ponder and search their hearts whether they shall be able to fulfil their reciprocal obligations which are incumbent upon them through the marriage contract. If the wife thinks she cannot do so, there is nothing wrong for her in paying the compensation to her husband; neither there is anything wrong for the husband in accepting compensation for Khula from the wife. The instant Holy verse addresses the couple. The pronoun 'ye' stands for both of them. It has further been said that the word 'Khawf' means knowledge. That is to say that the couple must be understanding that they would not be able to maintain the limits ordained by Allah. This gives them the fear of the occurrence of the unpleasant events. This word fear carries with it the sense of presumption. It has further been argued that in phrase "fa in Khiftum"

(then if ye fear) its subject has not been named. They are rulers[18].

This interpretation has been adopted by Abu Ubaydah who maintains that the word of Allah "Khiftum" implies more then two but besides the couple, it also refers to rulers. If it was intended only for couple, i.e. fear exclusively for the couple, then Allah must have as well used in the earlier expression of the verse 'Khiftuma' implies two and this proves the fact that effecting Khula is the jurisdiction of Sultan or state through its judiciary, if the spouses do not agree between themselves[19].

In the above Quranic verses maintaining amicability of the association by both the couples has been made incumbent impliedly. The verse is addressed to officials and arbitrators who, both being officials, are engaged in such affairs. A woman's not maintaining the limits ordained by Allah is her neglecting or avoiding of the performance of duties towards her husband as well as not obeying him at all. This has been stated by Ibn Abbas, Malik bin Anas and generality of the Jurists. Abu Al Hasan and a group along with him are of the view that, "when the wife tells her husband that she would not obey any of his orders or she shall not carry-out any of his biddings, Khula shall become valid. Imam Shafi'i said that the

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18. Abu Abdullah Muhammad Al Ansari Al-Qurtubi; *Al-Jami Al-Akhmal Qur'an*, p. 137, quoted by Tanzil-ur-Rahman; A code of Muslim personal law, P. 526.
19. Ibid.

expression" (not being maintained by the spouses of the limits of God", implies malice enmity, and disobedience on their part. Atab Abi Rabah has said that Khula shall be valid when the wife tells her husband, "I hate you, I do not love you and so on". It shall not be committing sin if the wife pays her husband any compensation for his effecting Khula[20].

Commenting on this verse (11: 229) of the Holy Qur'an, Abdullah Yusuf Ali says that if separation is inevitable the parties should not indulge themselves in throwing mud at each other, but recognize what is right and honourable on the consideration of all the circumstances. In any case a man is not to allowed to ask back for any gift or property he may have given to his wife. This is for the protection of the economically weaker sex, lest that protective provision itself work against woman's freedom, a exception is made out to the general rule. Therefore as a general rule it is not lawful and proper for the man to take back any of the gift presented by him to his wife on the solemnization of their marriage. However when both of them fear that it is not possible for them to maintain limits ordained by Allah and also the mediator from the both side fear that couples would be failing to observe the limits of Allah, the wife may seek her release from the marriage giving the compensation to the

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20. Ibid. P. 527

husband and it is also not unlawful for the husband to accept the compensation given in lieu of the divorce[21].

Therefore, all the prohibitions and limits prescribed here are in the interest of good and honourable lives for both side and in the interests of clean and honourable social life without public and private scandals. If there is any fear that in safeguarding her economic rights, her very freedom of person may suffer, the husband refusing the dissolution of marriage and treating her with cruelty, then in sexual exceptional cases, it is permissible to give some materiel consideration to the husband but the need and equity of this should be submitted to the judgement of impartial judge i.e. properly constituted court. Divorce of this kind is called Khula[22].

Maulana Syed Abul A'Ala Maududi has rightly formulated that the husband has no right to demand back any thing of the dower given to the wife in consideration for marriage or ornaments, clothes etc. given to her as gifts. It is utterly against the moral principles of Islam to ask for the return of any thing given to another as a present of gift. The Holy Prophet (PBUH) (PBUH) likens this disgraceful behaviour to the licking up his own vomit by the dog. It is indeed very shameful on the part of the husband to take back or demand what he himself gave to his wife. As a matter of fact Islam exhorts

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21. Abdullah Yusuf Ali:*The Glorious Qur'an Translation and commentary*, P. 90 2nd ed. (1977) American Trust Publication.
22- Ibid P. 91.

the husband to give her something at her departure[23].

However, there is an exception to this general rule. When divorce is obtained by the wife from her husband and if the husband and wife agree between themselves on some terms regarding this that shall be enforced. But if the case goes to the court, it will first try to ascertain whether the wife really dislike her husband so much so that she can not live with him any longer. Then if the court is satisfied that they cannot live together happily, it shall fix as compensation anything that is considered proper and the husband shall have to accept that and divorce his wife. The jurists are generally of the opinion that the compensation should not exceed the dower given by the husband[24].

Maulana Syed Abul A'Ala Maudidi explaining meaning of Holy verse 229 of Sura Al- Baqar holds following points:

(1) Khula demands a situation in which there is a fear that the limits set by Allah may be violated. The expression "There is no blame on the two of them suggests that though Khula is undesirable like a divorce, yet when there is a fear that the limits of Allah might be violated, there is no harm in obtaining a Khula[25].

23- The Meaning of the Quran : Vol. 1st P. 160, English Translation of Maulana Syed Abul A'Ala Mauduidi's "*Tanfheeh-ul-Quran*" (Urdu)
24. Ibid P. 161.
25. Supra note 3, P. 48.

(2) When a woman wants repudiation of the marriage-tie, she must also scarify some wealth just as man has to scarify some wealth when he divorces his wife on his own accord. When he gives divorce himself, he cannot take any thing back from the wealth he has given to his wife. Likewise, if the wife desires separation, she has to parts with the whole or part of that wealth she received from the husband[26].

(3) The mere wish of wife to repudiate the marriage-tie by returning what she was given is not enough for obtaining a Khula. The husband too, should be willing to accept payment and let the wife go. In another word woman cannot hand over the man a sum of money and be off. Separation will be legally effective only when the husband accept the money she offers and divorces her[27].

(4) For Khula it is sufficient that the wife should give a part or whole of her Mahr (dowry) to seek divorce and the husband should accept it and give her divorce. The words of Quranic verse "There is no harm if both agree mutually", show that the wife may obtain divorce by giving something as compensation to the husband and that the Khula needs the mutual agreement of the spouses. The instant verse of Holy Qur'an contradicts the opinion of those people who regard a court decree as a pre-condition for the completion of Khula.

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26. Ibid.
27. Ibid.

Islam, Infact, does not command taking family matter to court, if it can be decided at home honourably and mutually[28].

If the wife offers the compensation for her release from the marriage bond but the husband turns down the offer, then she has right to knock the door of court, as is obvious from the words of Holy Qur'an Sura Al-Bakar Ayat 229, "If you fear that they might not be able to keep within the limits imposed by Allah". In this Holy verse the words "if you fear" are addressed to the authority (Ulil-Amr) amongst the Muslim, for it is their primary duty to keep a vigilant watch on limits set by Allah and of their being observed in letter and spirit. So, whenever there is a fear of breach of limits of Allah, the authority should intervene and restore her that right which Allah has given her for protection of these limits[29].

These are, in brief, the injunctions of the Holy Qur'an which lay down the situation which necessitate and legally justify wife's claim for Khula but they do not in detail account of circumstances which amount to the fear of over-stepping Allah's limits. Nor is there any hint as to what should be the standard in determining the rate of recompense amount to be offered by the wife. It has also not been explicitly laid down as to what course should the Qazi (Judge) follow if the husband does not agree to the demand of Khula by the woman.

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28. Ibid. P. 49.
29. Ibid.

In order to know the answer of these questions it is necessary to make the in-depth study of the decisions of Messenger of Allah (PBUS) and rightly guided Caliphs. These decisions would exhibit the principles, which the law courts should apply to the case brought by women against their husbands.

Ahadith (Traditions) regarding Khula:

In connection with the validity of Khula, the case of Jamila the wife of Thabit B. Qays b. Shams forms the basis of legislation. This incident, as the basis of the validity of Khula, has been referred to by most of the traditionalists. Hazrat Iman Bukhari has reported through Hazrat Ibn Abbas that one day the wife of Thabit b. Qays appeared before the Prophet (PBUH) (PBUH) and presented her complaint in the following words:

> *"O" Messenger of Allah Nothing can never unite his (Thabit) head with mine (Jameela). When I raised my veil I saw him coming in the company of a few men. I saw that he was blackest, the shortest and the worst appearance of them all. By Allah I do not dislike him because of defects in his faith or morality. I just hate his ugly looks. By God if I did not fear Allah, I would have spit on his face when he came near me". O' Messenger of Allah "you can see how beautiful I am while Thabit is an ugly man". I do not blame him for any depravity in his religious practice or*

morality, but I fear that I may be guilty of transgression of injunctions of Islam[30].

The messenger of Allah heard her complaint and observed:

"Will she return him the garden which Thabit had given to her". She replied; "O yes, Messenger of Allah. I shall give him even more if he demands more. The Messenger of Allah (PBUH) observed: "No, not more. Just return him his garden. He (Holy Prophet (PBUH)) then ordered: "Thabit take back the garden and divorce her which he did"[31].

Once a case of a husband and a wife was brought before Hazrat Umar. He admonished the women and advised her to stay with her husband but she refused. Thereupon, he shut her in a room full of rubbish. She was taken out after three days and Hazrat Umar asked her how she was. She replied, By Allah, "she had real comfort in these nights". "Hearing this, Umar ordered her husband to give her Khula even though it might be in the exchange of her ear-rings"[32].

Rabia bint Mauwwiz Ibn Afra tried to get Khula from her husband in exchange for all properties but he refused. The case was brought before Hazrat Usman who ordered her husband to take all even the hair of her head but to give her Khula[33].

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30. *Sahih-Al-Bukhari*: Vol, VII. P.150, Translated by Dr. Muhammad. Muhsin Khan, 1984 Kitab Bhawan New Delhi
31. Ibid.
32. Supra note 1, p. 63.
33. Ibid.

Thus, a study of these traditions make it clear that mere fact of a woman becoming disgusted with her husband is sufficient ground for legal separation between them. In the case of Jamila v/s Thabit b. Qais, the Prophet (PBUH) showed by his action that a woman's disapproval of her husband on physical grounds is a legitimate ground for a decree of separation in her favour. It is, therefore, enough for the court to satisfy itself that one of the partners has developed sufficient antipathy against the other to make the reconciliation impossible. The court need not inquire into the detail reasons of this antipathy, because a woman may dislike her husband on many grounds some of which she may not like to state openly. There may also be reasons for disgust which may not seem valid to the court or any other arbiter, but which may be sufficient to spoil the marital relations of the husband and wife. The court has no right to give its verdict on the point whether the reasons for dissatisfaction as expressed by the wife are valid. All it can do is to satisfy itself on the point whether the dissatisfaction is genuine or faked, whether it arises from causes which are temporary and may disappear or it is so deep rooted as to preclude the possibility of happier relations being restored[34].

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34. M. Mazher-Uddin Siddiqui: *Women in Islam*: P. 68, 1st ed. (1980), New Delhi.

It is also inadvisable for the court to inquire into whether a wife seeking Khula is doing so because she is sexually erotic and desires a variety of sexual pleasures or her aversion to her husband springs from genuine causes. The right of a man to divorce is not limited by condition that he should not use it for satisfying his anarchic sexual desire. If this is in the case of a man, it applies equally well to women who have got equal rights. Moreover, if a woman is really disposed to be sexually anarchic, the mere fact of being unable to obtain a divorce from a law-court will not prevent her from forming illicit unions, and in such a case the court, by refusing a decree of separation, will be supplying an incentive to illegitimate sexual activity, which is morally and socially more reprehensible than a frequency of divorces. The effect of a court decree in favour of separation is the same as that of final divorce pronounced by the husband which dissolves the marriage finally and irrevocably. The couple cannot be remarried unless the woman marries another husband and gets divorce[35].

Principles of Khula:

The reported decisions of Prophet (PBUH) (PBUP) and his companions are most significant as they set the precedent of law of Khula. In view of the verse 229 of Sura Baqra and decision of Holy

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35. Ibid.

Prophet (PBUH) in the case of Jameela v/s Thabit b. Qais lay down following guidelines:

(a) The decision of Holy Prophet (PBUH) in the case of Jamila set a precedent that for the purpose of granting a decree of Khula all that is needed is to prove the woman's degree of antipathy against her husband and her persistent refusal to pull on with him. Once it is established beyond any doubt that the woman totally hates her husband and is not able to live with him in accordance with the Shariah law, the decree of Khula should be carried out. No further inquiry is required to be made by the court as to the cause of the antipathy or dislikness of wife against her husband[36].

(b) The action of Hazrat Umar shows that the Qazi (i.e. Judge) can adopt suitable measures to find out the extent of the hatred of woman for her husband in order to establish beyond the doubt that two cannot, possibly, live together. The action of Hazrat Umar also establishes that it is not necessary for the Qazi (judge) to inquire into the cause of hatred. There can be many reasons for the cause of her hatred for her husband which cannot be disclosed publicly before other people. Then there can be such cause of hatred as may not be considered sufficiently valid by the court or any other arbiter but

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36. Mohd. Imran, *Ideal Women in Islam*, p. 36 2nd ed. (1986) Markazi Maktaba Islamia, New Delhi

enough to create hatred in the heart of one who has to live with him day and night. Therefore, Qazi (judge) has no right to give his verdict on the point whether reasons for dissatisfaction as expressed by wife are valid. The duty of the Qazi (judge) is only to satisfy himself on the point whether there is hatred in the heart of wife against her husband and whether it arises from the cause which are temporary and may disappear or it is so deep rooted as to preclude possibility of happier relations being resrtored[37].

(c) In considering the cause of Khula the question whether the women's demand of Khula is based on the genuine need or merely for self gratification is not justifiable at all and was completely ignored by Holy Prophet (PBUH) and his rightly guided Caliph while deciding the Khula suits. As a matter of fact a thorough prove into this problem is beyond the power of a judge. First it is practically impossible for any judge to decide such question. Secondly, Khula is right of the woman given to her by Allah and is parallel to the man's right of divorce. The sexual pleasure and variety of lust may be the motivating force for Khula and divorce. When the man's right of divorce is not limited by a condition in law that its use should be for gratifying sexual lust and pleasure. Therefore, in purely legal sense, the woman's right of Khula cannot be subjected to any moral

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37- Murtada Mutahhari: *The Right of Women in Islam*, p. 301, 1st ed., (1981), Tehran.

restriction. Third, one of the two possibilities may be true. Either she has a real and lawful need for Khula or she is mere seeker of pleasure. If it is first reason, then it would be an aggression against her to reject her request. And if it is the second reason, then refusal to grant her Khula may endanger the most important object of Shariah, for, if a woman is a pleasure seeking by nature, then she will design some plan for the satisfaction of her lust. If you do not allow her to get it by lawful means, she will endeavour to satisfy her desire by unlawful means and it will have much worse result than Khula[38].

(d) In Khula also, like divorce, the intervention of the Qazi or court is, generally, undesirable. If the husband and wife have settled their terms by mutual agreement i.e. the woman is agreed to pay back dower and man accepting the same, the Khula automatically comes into force without any formal court decree acknowledging the declaration of Khula. However, if a woman seeks Khula and the husband disagrees, then the intervention of Qazi or court becomes necessary. The Qazi or court can probe into the causes of disagreement. If the findings of the Qazi establish that the wife cannot live with her husband for some genuine reasons, then the Qazi shall order the husband to divorce the wife. In all such instances, the Holy Prophet (PBUH) and his rightly guided caliphs accepted the compensation from the wife and ordered the husband to divorce her.

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38. Ibid, P. 302

The order of the judge is to be obeyed by the husband, so much so that if he does not obey, he can be sent to prison for this disobedience[39].

(e) The separation resulting from Khula as explained by the Holy Prophet (PBUH) amounts equivalent to one irrevocable divorce and after this, the husband will have no right to compromise during the waiting period (Iddat) because this right would completely nullify the object of Khula. Moreover, the recompense money paid by women to the man is a price paid for freedom from the bond of marriage. If the husband accepts the recompense wealth but does not free her, it will be a deceit and cheating on the part of husband which is unlawful in Islamic Shariah. If the woman wants to remarry the same man, she can do so because Khula is not a divorce mughallaz (final) after which the remarriage is lawful only when women marries another man and he divorces her after the consummation of marriage of his own accord i.e. Halala. Halala means that if the woman wants to remarry with the same man she can do so but she can do so only after she has had marital relations with other man and has been divorced by him[40].

39- Supra note 1 P. 64.

40- Mohammad Iqbal Siddiqi: *The Family laws of Islam*, P. 237, 1st ed. (1986) New Delhi.

(f) No limit has been placed on the determination of amount of compensation for Khula. Whatever amount of compensation is agreed upon between the parties mutually, Khula can be given. However Holy Prophet (PBUH) did not approve a man taking more than what he has given her in dower[41].

Limitations of Khula:

The law determines people's right. Just as man has right to divorce so has woman the right to Khula. So both have equal rights to separate when it becomes impossible for them to live together as husband and wife. Law will intervene only when any of the parties to the marriage uses one's rights unjustly against the other party. The law will try to make amendment and rectify the situation and restore proper rights to the aggrieved party as far as possible within the limits of law. But the use of one's rights properly depends entirely on person himself or herself depending on his or her sense of justice and fear of Allah. No one can decide but the person himself or herself whether he or she is really using this right justly or merely for self-gratification. The law after giving this natural right can only place certain restriction to check its unjust and unlawful use against other party. It is explained in the Holy Qur'an and the authentic Ahadith at length that a man is given the right of divorce but subject to certain specific terms. For example, the divorce should not be pronounced

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41- Ibid.

during the period of menstruation and each divorce should be given in three separate period of purification (Tuhr) followed by abstinence from cohabitation during the period of Iddat and the divorcee should be retained in the matrimonial home and should be maintained by the former husband till the expiry of iddat period in the same fashion and style as she was maintained during the continuance of her marriage[42].

As the man's right of divorce is not absolute and is subject to just, fair and reasonable restrictions, like-wise woman is given the right to Khula with certain restriction as is clear from the commentary on verse II : 229 of Holy Qur'an. However, in view of Sura Al-Baqar Ayat 228 and 229 of the Holy Quran the wife's right to seek dissolution of her marital tie under the doctrine of Khula is not absolute but is subject to the following limitations.

1. The first limitation on the exercise of right of Khula is that wife is not a liberty like the husband to get herself released by making an outright declaration of divorce. A man can divorce his wife by making the pronouncement of divorce at his end and he is not required to seek the intervention of any third party or arbiter to effect the divorce. But in the case of Khula if at the women's request, the man agrees to divorce, then there is end of the marriage. But in case the husband refuses to release his wife from the marriage bond, she has to seek help of court of law and obtain a decree in her

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42 - Supra note 1, p. 61

favour. In all the cases decided by the Prophet (PBUH) (PBUH) or Caliphs, there is not a single case in which the wife divorced her self under the doctrine of Khula and then merely informed the Holy Prophet (PBUH) or the Caliphs of what she had done. In all the cases the wife sought the intervention of the Holy Prophet (PBUH) or the Caliphs. This establishes the law that wife cannot dissolve her marriage under Khula by making outright declaration of the divorce. But she has to get it effected through a decree of court[43].

2. The second limitation is returning of dower. In case of divorce, the husband is under mandatory obligation to pay unpaid amount of the dower and this makes husband to think time and again before taking the final decision of divorce as he has to pay the dower. Like-wise in case of Khula, the wife is required to pay compensation to the husband for releasing her from the bond of marriage. This go a long way to check the hasty action of the wife with regard to Khula, for, she will have to relinquish the whole or part of her dower[44].

3. The third limitation on Khula is that it is permissible if it is prima facie made out that the spouses are not living or cannot live within the limits set by Allah i.e. that they cannot perform the duties and fulfil the obligations incumbent on them on account of their

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43. Supra Note 40, p. 68
44. Malik Ram Baveja ; *Women in Islam*, P. 111, Ist. ed. (1988), Delhi

marriage. It has been seen that the second Caliph Hazrat Umar kept a woman under confinement for three days and nights. The question arise as to why he did so when she had not committed any sin. The only explanation can be that the Caliph wanted to gauge the true feelings of the woman, that is, whether she was seeking a divorce under the passing whim or if she was earnest in her desire for separation from her husband. A marriage is a serious thing and cannot be dissolved lightly and its dissolution is ordinarily undesirable except under special circumstances. It can be terminated only if the need for its dissolution is greater than to maintain it. Therefore, the termination of marriage under Khula is permissible only when the court is satisfied that marriage has completely, been broken down and has become devoid of its solemn objectives. The case of Jamila fully establishes this view[45].

Nature and Effect of Khula:

The union of marriage stands dissolved as soon as Khula is granted or the proposal is accepted by the other spouse. As soon as a release has been granted to by the husband, the wife is completely separated from him even though no compensation has been paid by her. Therefore, the Khula, in effect, amounts to one irrevocable divorce. The parties may however, remarry, if they

45- Supra note 8 P. 229.

so choose, even during the term of probation (Iddat) of the woman[46].

Is the Khula a dissolution of the marriage (Faskh) or a divorce. There is difference of opinion among the Jurists on this point.

According to Imam Abu Hanifa, the dissolution of the marriage by the use of the word Khula or its equivalents word amount to an irrevocable divorce. Burhan Al-Din Marghinani, the author of Hedaya, has said that granting of Khula shall take effect as one irrevocable divorce and the wife shall have to compensate the husband[47].

Under the Maliki Law dissolution of marriage by Khula constitute an irrevocable divorce. There are two reports about the law laid down by Imam Shafai'i'i. According to an earlier opinion of Imam Shafai'i, Khula effect a separation between husband and wife. In other words it result in "Faskh" or cancellation of the marriage. It does not take effect as a divorce. But according to his later and final opinion Khula amounts an irrevocable divorce which is usually regarded a correct view[48].

According to Imam Ahmad Ibn Hanbal, if the marriage is dissolved by the use of the word Khula, it shall amount to an irrevocable divorce. If it is, however, dissolved by the use of the word Talaq, there are two opinion expressed by him. According to one, it shall amount to a faskh or

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46. Ibn Abdin al Shaybani; *Radd-ul-Mukhtar*, vol. II P. 575.
47. *Fatawa Alamgiriyyah*; vol II. P. 118
48. Supra note 10, P. 548.

cancellation of the marriage but according to other it shall be deemed as irrevocable divorce.

Thus, by holding Khula as faskh (dissolution of marriage) the point of view about reconstructing marriage with one's own wife who was earlier pronounced two divorces and then separated by Khula without an intervening consummated marriage appears to be misconceived. The jurists who do not consider Khula as divorce but consider it as fask take it out from the category of divorces. It shall thus amount to an addition over and above three divorces which is not established either by Qur'an or Sunnah. Khula being effective as an irrevocable divorce, the parties may, however, remarry without any intervening marriage provided the wife, at the time of Khula was not undergoing the period of iddat of two revocable divorces. In such an event, the two divorces earlier pronounced to the wife who was then separated by Khula make it unlawful for her to remarry the same husband without an intervening consummated marriage, as the Khula being in the order of the divorce, the maximum number of three divorces stood exhausted. According to some theologians a revocable divorce takes effect by pronouncement of Khula. The husband according to them, after effecting Khula to his wife, may have recourse to her during her observance of the term of the probation. Indeed in the event of his having recourse to her, he shall have to give back to her what he received from his wife as

compensation for effecting Khula. But the view of holding the Khula as revocable divorce is not correct[49].

The correct viewpoint appears to be that Khula is an irrevocable divorce in its effect though not in its nature. The contract of marriage in a revocable divorce subsists till the term of the probation terminates and the husband may have recourse to her during the continuance of the term of her probation, whereas in Khula in lieu of compensation, the intention is to secure complete separation from the husband which, in effect, is an irrevocable divorce. In khula the wife pays compensation so that she may have complete mastery over herself. This can happen only when she obtains irrevocable divorce[50].

It is clear from foregoing discussion that where a marriage is dissolved by means of Khula, it takes effect as an irrevocable divorce. According to Shia law, a Talaq resulting from Khula continues to be irrevocable so long as she does not claim the consideration during iddat but if she claims, the husband may revoke the Talaq. Moreover, the effect of Khula is that whatever rights are created between husband and wife on account of marriage contract comes to an end and the couple are exonerated from obligation owing to each other. It is said in Khulasatul Fatawa that they are not liable to be so exonerated if divorce is effected for

49. Supra note 10 P. 550.
50. Maulana Syed Amir Ali; *Ayn Al-Hidayah*: Vol. II, 270 (1938) New Delhi.

consideration. Al-Kasani is of the opinion that Khula effected for compensation resemble divorce effected for consideration and it is an established rule that the rights of a person do not laps unless they are made to laps by him. Hence only those rights shall laps in Khula that are mentioned in the agreement of Khula but all those debts which are not due on account of marriage contract shall not laps[51].

Effect of Khula on Dower:

Any lawful object can form the consideration of Khula. Hence, it is open to the spouses to agree to Khula on the condition that the wife surrenders her dower as consideration for Khula. In such a case the marriage shall be dissolved while the wife shall lose her right to the dower. It can, however, be made an express condition of Khula that wife's dower or a portion thereof shall remain payable by the husband. There is a difference of opinion amongst Hanafi jurists about the husband's liability for the payment of wife's dower and wife's liability for its return if it has already been paid to her.

If the marriage has not been consummated and the dower has not been paid to her, then according to Imam Abu Hanifa, no amount of dower be due to her. She shall not be entitled to get her dower or any portion thereof from her husband. She shall pay to him the consideration agreed upon. According to Abu Yusuf and Muhammad, the wife shall be entitled

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51. Shaikh Nizami; *Fatawa Alamgiriyyah* ; Vol. II; P. 119.

to the half of the dower from the husband. The consideration agreed upon has, of course, to be paid by the wife to the husband in each case. However, if the husband divorces his wife by Khula in consideration of her dower and in case the marriage has been consummated and the whole dower has been paid to the wife, then the husband shall be entitled to its return by the wife. If it has not yet been paid to her, there are two opinions expressed by Hanafi jurists in this respect. According to one, the same rule shall apply as held by Abu Hanifa regarding dower in Khula. But according to second opinion, which is generally believed to be correct, the same rule shall apply as laid down by Muhammad and Abu Yusuf[52].

According to Maliki law if the marriage has not been consummated and parties settle Khula for a specific consideration, the wife shall have to pay the specified consideration and her right to the dower shall be extinguished. She shall not get whole or any portion of it[53].

According to Shafai'i law, if the spouses agree to a Khula for a particular consideration and the marriage has not been consummated, the wife shall be entitled to the half of the dower. If the whole dower has been paid to her, she shall have to return half of it. If it has not been paid to her, the husband has to pay half the dower to her. Imam Ahmad b. Hanbal holds that right to dower is not lost in consequence of Khula and husband remaining liable for its payment if same has not already been paid to the wife[54].

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52. Supra note 10, p. 560.
53. Ibid.
54. Ibid.

On examining the various aspects of law of Khula it appears that opinion of Imam Abu Yusuf and Imam Muhammad regarding Khula seems to be more weighty and acceptable and opinion of Abu Hanifa and Abu Yusuf on the question of Mubara'at appears to be more correct. In other words, only the non-financial commitments that are established on account of marriage contract shall automatically laps on Khula but husband shall not be exonerated of the liability of the financial rights, such as dower and maintenance, except when the wife agrees to it at the time of Khula being effected.

Effects of Khula on Maintenance:

The wife's right to maintenance and residence during the period of probation (Iddat) is the independent right of divorcee and it is not lost on the pronouncement of Khula because it arises only on the actual pronouncement of Khula and it is not claimable before. If a woman obtains Khula from her husband in consideration of all rights which she has against him even then she does not lose her right to maintenance during the period of iddat on the ground that the right does not accrue to her before the Khula. In the absence of the agreement to contrary the wife shall be entitled to maintenance during her period of iddah. But it is open to the parties to make it a condition of Khula that the wife will give up her right to maintenance during the period of her iddat. In same way the wife's right for claiming maintenance of her minor children shall not be lost unless she gives

up her right under an express agreement. The right to maintenance for her minor children can, therefore, be surrendered only under an express agreement to that effect. This is subject to the condition that at the time during which the wife gives up her right to the maintenance of the children should be specified. If it is not specified, the right to maintenance shall not be lost[55].

Indeed, so far as the right of the residence of the wife during probation (iddat) is concerned, it cannot be given up even by mutual agreement. This view is based on the ground that right of residence is a religious obligation ordained by God and has been specifically provided in the Holy Qur'an, wherein it is laid down in respect of divorced women.

'O' Prophet (PBUH)! When ye
Do divorce them at their
Prescribed periods;
And count (accurately)
Their prescribed periods;
And fear God your lord;
And turn them not out of their house,
Nor shell they themselves leave,
Except in case they are
Guilty of some open lewdness
These are limits set by God[56]

In the instance verse of the Holy Qur'an Allah has decreed not to turn divorced wife out of her matrimonial house during the period of Iddat so that she, in pursuance of religious directive may, as of right, pass her

55. Supra note 8, p.p. 268 – 69.
56. Holy Quran LXV : 1,

period of probation there. This rule on social ground too is highly commendable. The direction contained in the above verse of the Holy Qur'an cannot be contravened and so the wife's right to residence shall not be lost. It is however, open to a wife to undertake the payment of the rent of a house which does not belong to the husband[57].

Mode of Effecting Khula:

A Khula can be effected by a proposal made by one party and its acceptance by the other party. No particular form has been prescribed for the expression, which may effect Khula. All that is needed is that a proposal is made by one side and the consent is formally expressed by the other party. It is however, a condition precedent that before the wife accepts the Khula she must understand the meaning of the term used by the husband because transaction is an exchange like Talaq which involves a loss of right. However, it is not necessary that proposal for Khula should proceed from one of the parties to a marriage. It can also be made by the guardian of the minor. According to some Jurists a third party may persuade the husband to give Khula to his wife for the consideration agreed to be paid.

A husband's consent to a proposal for Khula may be expressed or implied as when he accepts the consideration for a proposed Khula without

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57. Supra note 14, p. 561.

expressly giving his consent to it. The marriage shall be dissolved on his acceptance of consideration even when he does not divorce the wife. The proposal must convey the idea of payment of consideration directly or indirectly to the other party. Thus, the wife may say, "I give up my such and such claim as consideration for your divorcing me" or I gave up my claim for my dower while my husband releases me from the marriage tie"[58].

The acceptance of a proposal for Khula must be expressed in the same term as the proposal, that is, the acceptance cannot introduce a new or different consideration or condition, when a wife delivers the consideration demanded by the husband without expressly giving her consent to the husband's proposal, it shall be deemed to be as implied consent and Khula would be effected. Similarly, it is not necessary that the husband should expressly give his assent to the wife's proposal. Such consent may be inferred from his conduct. Thus, where a wife seeks a Khula for a specified consideration and husband accepts the same shall be presumed and a Khula shall be effected as soon as he accepts the same[59].

Nature of Consideration for Khula:

As a general rule the objects that can be given as dower may also form the objects of consideration in case of Khula because the object that can be fixed as a dower in a marriage contract can perfectly be made a compensation for dissolving the marriage.

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58. Supra note 8, p. 247.
59. Ibid.

According to Hanafi law, whatever is lawful to be accepted for dower can also be lawfully accepted as consideration for Khula. Thus, it can consist of such things as of immovable property, cash Jewelry etc. But it cannot consist of things which cannot be lawfully possessed by a Muslim. Thus, it cannot be wine, pork etc. But if the husband agrees to effect Khula to his wife in consideration of an unlawful object, the Khula shall be effected but the payment of such consideration would not be incumbent on the wife. This is due to the fact that a Muslim husband cannot lawfully possess such an object and so he can not ask the wife to give it to him[60].

According to Maliki law all the things which are lawful can validly form the consideration for Khula. If consideration consists of such things as are forbidden like pork, wine or something, which has been obtained by theft a violent means or by usurpation, then the Khula shall be valid but the husband shall not be entitled to any consideration.

Under Shafai'i law all the things, which can be given for dower can be given for khula. It should consist of lawful things. The wife must be capable of giving it to the husband. If it consists of such things as are not lawful like pork, wine etc. then the wife shall have to pay Mahrul-misl i.e. the dower of a woman of equal status. Imam

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60. Ibid.: p.573.

Ahmad bin Hanbal holds that Khula is agreed for an unlawful things will be effected but no consideration shall be paid by the wife[61].

According to Abu Hanifa and Imam Shafai'i the amount of consideration to be paid for Khula must be specific and be of ascertainable value. According to Imam Malik, however, an unknown and unascertainable thing too may form consideration for Khula. The reason for this difference is that according to Imam Abu Hanifa and Shafai'i, the compensation for Khula resembles the consideration in sale hence, all the attributes of consideration for sale have to be observed in the matter of compensation for Khula as well. But according to Imam Malik, however, the compensation for Khula has the characteristic of a gift, or bequest, hence its existence at the time of Khula was unnecessary[62].

If a husband gives a Khula to his wife without specifying or fixing any consideration and wife agrees to it, an irrevocable divorce shall be effected but no consideration shall be payable by her. She shall however, have to return the dower if she has already realised it. If she has not realised it, it shall be effected but no consideration shall be payable by her. Moreover, all the rights of the wife against the husband arising out of marriage shall be extinguished. However there must be a definite mention of payment of consideration. If

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61. Ibid.
62. Supra note 10, p. 520.

there is no mention of any consideration then the expression used by the husband may amount to a divorce but cannot effect khula[63].

Quantum of Compensation for Khula:

> *"If ye (Judge) do indeed fear,*
> *that they would be unable to keep limits ordained by*
> *God, there is no blame on either of them if she gives,*
> *something for her freedom"*[64]

The above verse of the Holy Quran has been interpreted to mean that in Islam a Muslim wife can seek freedom from her marital bond by providing iwaz or compensation to her husband. But the instant Holy verse does not explicity mention quantum or amount of compensation to be paid by the wife to her husband for her freedom. Consequently, the expression there is no blame on either of them if she gives something for her freedom, have been differently interpreted by the Muslim Jurists which leads to the emergence of the following three views about the amount of compensation in Khula [65].

1. According to some Jurists, the quantum of compensation can be larger than what the husband has given to the wife in consideration of marriage.
2. According to some, quantum of compensation cannot be in excess of that the husband has given to the wife in consideration of marriage;

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63. Ibid. p.521
64. Holy Quran : II: 229,
65. Mohd. Altaf Hussain Ahangar; Compensation in Khula-An Appraisal of Judicial interpretation in Pakistan; P. 113; XIII ICLR (1993).

3. According to some, quantum of compensation cannot be more than stipulated or proper dower.

Unlimited Compensation:

The Jurists who uphold validity of unlimited compensation on the part of the wife in Khula argue that there is no limit mentioned on the compensation in Holy Quran verse II : 229 and so whatever compensation is agreed upon between the parties, it shall be lawful. Caliph Hazrat Umar appears to have endorsed this view point in a case. It is reported that before him appeared a women and her husband. The woman wanted a divorce. Hazrat Umar advised her to live with her husband, but she refused. Therefore, he shut her in a room full of rubbish. She was taken out after three days, he asked her how she was. She replied, By Allah; " She had real comfort in these nights". Hearing this, Hazrat Umar said to the husband, " Give her Khula even if it be in lieu of her ring". This view point also finds favour of Caliph Hazrat Usman.[66]

Abdul Razzaq has reported that Rabia bint Muawwadh bint Afra told him that she obtained Khula from her husband in return of everything of which she was owner. When the matter was taken to Caliph Usman, he held the same to be lawful. Imam Shafai'i and Imam

66. Supra note 1, p. 63.

Malik approved payment of excessive compensation. They hold that taking back more than dower is lawful.[67]

Jafari Shias also do not recognise any fetter on compensation limit. Baillie writes in this regard that there is no limit to the amount of compensation and therefore, it may lawfully exceed whatever was given to the women as her dower. [68]

In a Tehran Publication it is found that Ali bin Ibrahim through his father Ibn Ali Amir and he through Imam Muhammad Baqir reports that a woman to whom Khula is given, the man may take compensation from her whatever she likes to give or on what both agree; it may be dower amount or more than that.[69]

Compensation Equivalent to Transferred Benefit:

Most of the Jurist have read the Holy verse " If ye fear for her release ------" in conjunction with the tradition of Holy Prophet (PBUH) (PBUH). Consequently, they disallow the taking of more than what the husband has given on the basis of rule deducible from Holy Prophet's directives in the instance relating to the wife of Thabit Ibn Qais. As stated before, on hearing the complaint of Jameela, wife of Sabit Ibn Qais, the

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67. Ibid.
68. Neil. B.E. Baillie; *A Digest of Moohammedan Law*, Vol. II, P. 130 (1965) Smith & Co. London
69. *Al-Istibsar, Haq-i-Khula-wa Mubara'at*; Vol. VIII P. 101, Quoted by Mohd Altaf Hussain Ahangar: Supra note 70.

Holy Prophet (PBUH) asked her if she was prepared to return the garden give to her by her husband by way of dower. She replied that she was prepared to give him even more if he demands more. The Holy Prophet (PBUH) said, " No, not more than that". This tradition establishes very clearly that a husband cannot lawfully take from the wife more than what he had given to her by way of dower. [70]

Amongst the companions of the Prophet (PBUH) Caliph Abu Bakar considered the taking of compensation by husband exceeding the benefits received by his wife from him to be unlawful and maintained that the husband shall be made to return the same to the wife. Taus and Zuhri also hold that it is not lawful for husband to take back more than what he had given to the wife[71].

According to Imam Abu Hanifa, the amount of consideration paid or to be paid for a Khula should not exceed the amount of dower or property given to the wife by the husband. His disciple Muhammad al Shaybani writes that if the wife in return for anything gets herself released through Khula, it shall Judicially be lawful but I do not approve that husband should take from his wife more than what he has given to her inspite of the fact that difference had arisen on account of wife. If the difference arises on account of husband I do not approve a husband taking anything at all. If he takes

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70. See : for detail Supra note 30, P. 159.
71- Supra note 10, P. 518.

some thing, though it shall be lawful Judicially but in all the conscience i.e. between man and God, it shall be loath some"[72].

Strangely, the compensation equivalent to transferred benefit rule has not found any explicit acceptance in the legislation enacted in various Muslim countries.

Compensation not exceeding dower amount :

The third group of the Jurist have interpreted the Quranic verse II : 229 and tradition pertaining to compensation in Khula to mean that maximum compensation cannot be more than dower paid by the husband. According to Ata, if the husband takes anything more than dower, he shall be made to restore the same. The Hedaya also treats it abominable on the part of the husband to have more than dower itself.

Reason for Difference of Opinion :

The basis of different opinions of Jurists regarding the quantum of compensation in Khula is due to their reliance on different interpretations of law. Those persons who hold the taking of quantum larger than what the husband has given to his wife as compensation for effecting Khula to be lawful, base their argument on Quranic Verse II:229. They takes its apparent meaning that the Holy Quran dopes not limit to amount of compensation either away. They further rely on Qiyas and hold Khula to

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72- Mohammed al-Shybani; *Muwatta*; P. 251, Karachi- Pakistan.

resemble those matter in which compensation is paid. Hence, according to them, whatever compensation is agreed upon between parties, it shall be legal. If the husband demands more than that he has given to his wife and she agreed to it the same shall be legal[73].

On the contrary, the Jurists who forbid taking more than what the husband had paid, argue on the basis of tradition narrated by Zubair that Thabit b. Qays intended to effect Khula to his wife and when Holy Prophet (PBUH) inquired of his wife whether she would return that to her husband which he had given to her as dower, she replied, "yes" and more than it. Thereupon Holy Prophet (PBUH) forbade her from giving more[74].

Judicial View

In Pakistan as well as India there is no enacted law which deals exclusively with the institution of Khula. Consequently, the problem pertaining to Khula, particularly compensation, fixation have been entrusted to the Judiciary. Expectedly, Judiciary has come out with varying decision on the issue of compensation.

In Mohammed Amin[75] case the husband had petitioned for the restitution conjugal rights whereas, in response, the wife had sued for dissolution of marriage on various grounds. The trial court decreed

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73. Supranote 10, P. 519.
74. Ibid
75. *Mohammed Amin v/s Aisha Bibi*; 1984, CLC 1389, Lahore.

restitution of conjugal rights. On appeal, the first appellate court allowed Khula in favour of wife with observation:

> *"I propose to grant Khula in lieu of waiving the right of Aisha i.e. wife for recovery of dower and any past" maintenance".*

On second appeal, the court while deciding not to disturb any part of first appeal observed:

> *"I find that the question of Khula and the benefit received by the wife have been attended to by the learned Additional District Judge. He had applied his mind and given sound reasons to support his decision. The learned Judge further observed that if dowry means that whatever was given to the wife at the time of marriage by her husband, then the compensation is within the Shariah limits and cannot be objected. However, if the dowry included the property which the wife brought with herself from the parental house at the time of marriage, then obviously the court has allowed excessive compensation to the husband"* [76].

In Razia Begum[77] case, the Karachi High court held that if a wife seeks Khula without pointing out to any default of husband and court consider it proper to grant a decree for Khula then wife should be ordered to return all the benefits received by her and also forgo such rights under which she can claim any benefits.

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76. Ibid. P. 1390.
77. *Razia Begum v/s Saqir Ahmad*; 1982, CLC. 27.

Contrary to the above judgements, the other judicial trend in Pakistan is to decree the return of all conferred benefits by wife to her husband as a compensation upon". *In Bilqis Fatima v/s Najmul Ikram*[78] while allowing Khula court observed the wife is entitled to the dissolution of marriage on restoration of what she receive in consideration.

Bilqis Fatima case was followed by full bench of Pakistan Supreme Court in *Khursheed Bibi v/s Mohd. Amin*[79]. In this case while allowing Khula, the court observed that in the instances of Khula, the wife has to return the benefits of marriage. As a general rule she cannot retain the benefit i.e. the consideration of marriage. Therefore it is necessary for the court to ascertain in a case of Khula what benefit have been conferred on the wife by the husband as the consideration of marriage.

In *Parveen Begum v/s Mohammed Ali*[80] the court again observed;

> *"Taking back more than what the husband has given to his wife as ransom of Khula; though not expressly prohibited in the Holy Quran, is a Sheer deviation from the establishes tradition of Holy Prophet (PBUH). Therefore I totally disapprove any such fixation of ransom which evidently is in negation and defiance of commandment of Prophet (PBUH)."*

Disentitlement to compensation :

Ordinarily, payment of compensation by a wife to her husband is

78. PLD, 1959Lahore. P. 567
79. PLD. 1967, SC121.
80. PLD, 1981, Lahore P. 116.

sine-qua-non for the obtainment of Khula. However, Jurists in general have identified certain circumstances under which a husband can be deprived of compensation.

In Radd-ul-Mukhtar, it is provided that if Khula is due to ill-treatment by the husband, he cannot lawfully take any consideration from the wife because Allah has enjoined on the husband not to take back any thing from the wives[81].

It is stated in Al-Hedaya that if the cruelty is from the side of the husband his realising from the wife compensation for effecting Khula is disapproved. If insubordination is from the wife in that case the husband may take back only property given to her by him[82].

The above viewpoints are based on the authority of following verse of Holy Qur'an:

> *" And if ye wish to have one wife*
> *in place of another, and you have given*
> *one of them a heap of gold take nothing*
> *from it"*[83].

The dictate is based on expediency. The wife in such situation is put to the inconvenience of having her marriage dissolved by the husband and so she must not, in addition there to , be put to financial loss .Hence the

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81. Supranote 65, P. 114
82. *The Hedaya*; Vol I, P. 113, Translated by Charles Hamilton, Islamic Book Trust Delhi.
83. Holy Quran IV: 20.

above quoted Quranic verse , in its broader sense, disentitle the husband from realising any compensation from the wife in lieu of effecting Khula when he himself is the initiator of Khula . In other words if the husband is to be blamed for disagreement or discord, then he is forbidden to realise from wife any compensation for effecting Khula .

The above views suggest that over all there is a moral and not legal bar against the husband claiming compensation from his wife when he him self is the initiator of Khula or the wife is put in compelling situation to demand for Khula.

However, in *Munshee Abdul Azize v/s Noor Miyan*[84] cruelty was considered as legal bar claiming compensation. In the instant case, the wife claimed divorce on various grounds including Khula and cruelty. The trial court dismissed wife's plaint. On appeal, the court reversed the finding of trail court and decreed suit on the ground of cruelty and Khula. Aggrieved by the judgement, the husband filed an appeal on the ground that appellate court having not determined the benefits taken by the wife was not legally justified to decree the suit. Dismissing appeal, the Lahore High court observed that since the marriage has been dissolved on the ground of cruelty of petitioner (husband) with the respondent wife, the mere fact that learned appellate court failed to determined the benefits derived by wife would not make any difference.

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84. 1985, CLC, 2546.

A husband is entailed to compensation only when his wife has derived some benefit from him in consideration of marriage . where the wife has not been benefitted at all , she is not legally liable for the payment of compensation to her husband in consideration of Khula , In *Ghulam Mustafa V/S Mst. Ghulam Sakina*[85], the Court observed that in absence of proof of receipt of benefits from husband , wife would be entitled to grant Khula without restoration of unproved benefits.

Where the husband pronounces Khula to his wife without any demand or specification of compensation, the question which arises is, can he claim compensation later on or is he disentitled to claim compensation? In this regard, Baillie is of the view that when they have mutually entered into a Khula without mentioning any exchange it is correct to say that each of the parties would be freed from his fellow and that no part of dower were due by the husband she would be obliged to restore what may have been advanced to her as dower amount[86].

Abdur-Rahman clears the position thus :

"Where a husband pronounces Khula repudiation against his wife without any compensation, the respective claims of husband and wife are not cancelled , and they can sue each other for payment of any debts which may be due [87]."

85.. PLD 1986 Lahore, 324.
86. Supra note 68 P. 313.
87, Abdur Rahman; *Institute of Mussalman Law*, P. 157, (1980) Lahore.

What can be safely deduced from the above views is that when compensation has not been demanded by the husband at the time of Khula , wife is not supposed, of her own, to restore him any marriage benefit and meanwhile other rights and obligations of parties remain intact.

Effect of Non payment of Compensation:

Ordinarily, Khula is a dissolution of marriage on the payment of compensation by the wife to her Husband. Therefore, one of the basic requirements for the grant of Khula as enjoined by Islam and held by the courts of Pakistan is that if wife has oblained any tangible benefit from the husband she should be made to return the same as a condition precedent for the grant of Khula in case the husband does not forego the same but ask for their return. However, where the compensation is determined between the parties or settled through the court and later on wife fails to pay it, then what are the effect upon the Khula itself.

In this regard the Hedaya lays down that the consent given by the husband to a separation on condition of wife abandoning dower, or paying him a certain sum, or making over to him any property, does not entitle him to cancel Khula on her failing to fulfil the contract but he may either sue for the amount she agreed to pay him or set-off the same against any claim she may advanced against him[88].

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88. Supra note 82, P. 320.

This point was taken up by privy council in case of *Moonshee Bazul-ur-Rehman*[89] case where in the court observed that the non –payment of consideration by the wife for the divorce no more invalidate divorce.

The point again came up before Karachi High court in Shamshad Begum[90] case where in the court made following observation:

> *"Although, consideration is a valid and even generally an essential requirement for Khula and such payment ordinarily is payable immediately, or at an agreed time, the view expressed by M.N. Ahmad in his valuable and exhaustive treaties, " Principles of Muslim law" at page 259 is that failure of wife to pay consideration does not cancel Khula but husband shall be entitled to recover the same from wife under law or he may set-off same against claim that she may have against him".*

Endorsing the observation in Moonshee Buzul-ur-Rehman case, the Pakistan Supreme Court is Dr. Akhlaq Ahmad case[91] observed :

> *"Once the family court came to the conclusion that the parties cannot remain within the limits of God and dissolution of marriage by Khula must take place, the inquiry into terms on which such dissolution shall take place does not affect the conclusion but only creates civil liabilities with regard to the benefits to be returned by the wife to the husband and does not affect dissolution itself".*

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89. Moonsee Bazul-UR- Rahman v/s Lateefun –Nissa (1861) IA. 378.
90. Shamshad Begum v/s Abdul Haque, PLD 1977 Karachi P. 55.
91. Dr. Akhlaq Ahmad v/s Mst. Kishwar Sultana, PLD 1983 SC. 169.

Power of Compensation Determination

It has been seen that the Jurists regarding the quantum of compensation have presented different views. But the question, which arises is that who has a final say in determination of the compensation in case wife seeks Khula through court order. The classical Jurists have not provided any answer to this question. However, the direction by the Holy Prophet (PBUH) to the Thabit bin Qais to receive his garden back and divorce his wife implies that the court has got power to determine the amount of compensation to be paid by wife to the husband and same is binding upon husband[92].

The Judicial trend on this issue is not definite and certain. In Bilqis Fatima[93] case the Lahore High court observed that while effecting separation the Qazi or the judge has the power to adjust the financial matters so as to direct a partial or total restoration of the benefits received by the wife.

From this observation of the court it is clear that the court has got inherent power to determine the payable compensation but the court explicitly recognise the Judicial direction in this regard when it says that if the husband is not in any way at fault there has to be restoration of property received by the wife and ordinarily it will be whole of the property but the

92. Supra note 65, P. 132.
93. PLD. 1959 Lahore. P. 566.

judge may take into consideration reciprocal benefits received by the husband and continuous living together may also be a benefit received.[94]

From this it is evident that the authority of court to award compensation is at most to the extent of the return of marriage benefits given by the husband to wife and court can lessen the compensation in view of reciprocal benefits received by the husband. Thus, the court has no discretionary power to direct the wife to compensate her husband from her personal property or beyond the marital benefits received by her during the coverture. The case of Khurshid Bibi[95] also highlights the same position.

A close look into Khurshid Bibi case reveals somewhat conflicting judicial trend. On the one hand husband given is free hand in claiming compensation from wife within the limits of marriage benefits given to her by her husband at the time of marriage and simultaneously, court claims power with the judiciary regarding compensation finally payable to husband. The judicial pronounce-ments also establish beyond all the doubts that in case of dispute as to the payable amount of compensation, final authority rests with the court to determine the compensation amount to be paid by wife to her husband in lieu of Khula.

Power of court to grant Khula against Consent of Husband:

The question to be considered is whether the husband consent is a

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94. Ibid.
95. Khurshid Bibi v/s Mohd. Amin, PLD 1967 SC97.

condition precedent to the dissolution of marriage under the provision of Khula or has the Qazi or Judge the power to separate the parties even against the wishes of husband when he is satisfied that spouses cannot live within limits set by Allah. This is a very important rule of Muslim Law and greatly affects the rights of Muslim wives. It is, therefore, necessary to discuss the matter in some detail.

The Muslim Jurists have generally expressed the view that the Qazi (Judge) is not competent to dissolve the marriage if the husband refuses to divorce his wife under the doctrine of Khula. The courts in India have followed this view. The Allahabad High Court in Mariam Bibi v/s Nur Mohd[96] held that a suit by a Muslim wife to compel her husband to give her a Khula is not maintainable. It was further held that a divorce by Khula is the sole act of husband and to exercise such power is wholly a matter within his own discretion and it is not demandable by wife as a matter of right under Muslim Law.

The Lahore High Court also expressed the same view in Mst. Umar Bibi v/s Mohd. Din[97]. The court observed that it is only husband or his agent who can effect the Khula and it is not possible for a Qazi or Court to do so as no such powers are vested in them. Again a bench of the same High Court in *Sayeeda Khanum v/s Mohammad Salim*[98] observed that the

96. 1882, Allahabad. 83.
97. A. I. R. 1945 L.
98. 1952, P.L.D. Lahore: 131.

decisions of the courts in khula cases was greatly influenced by the views expressed by some of the Muslim scholars that right to divorce is an absolute power of the husband and subsistence of the marriage tie in all the circumstances can be put to end only by the utterance of the husband and non else.

The decisions of the courts in the instant cases suggest as if the right to dissolve the marriage is an absolute and unilateral power of the husband and its exercise depends on his sweet will and non-else. Whereas the case decided by the Prophet (PBUH) and the caliphs strongly lead to the view that decision of such does not depend on the sweet will of the husband. The case of Jamilah and her husband Thabit b. Qays discussed herein before establishes beyond all the doubts that in the case of Jamilah Holy Prophet (PBUH) asked Thabit to divorce his wife. It also establishes the fact that in genuine cases Khula was freely granted but in course of time women's rights were greatly curtailed by adverse views and men placed many restrictions on their rights and present doctrine of Khula is one of such cases[99].

The verse II: 229 of the Holy Qur'an explains the law of Khula. In this very verse, the words, *"if ye fear ---"* are addressed to the Muslim authorities i.e. the courts and this suggests the wisdom of law of Shariah: that if husband and wife cannot agree on Khula, then they should turn to the

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99. Supra note 8. P. 240.

law. This is proven by the fact that women took their cases to the Holy Prophet (PBUH) and his rightly guided Caliphs and they heard their complaints and gave their decisions. This is a clear testimony that if two parties can not mutually agree on Khula then the women should turn to the Court. Now if the Judge had the right only of hearing the case and in case of husband disagreeing, had not power to enforce his decisions, then it would be utterly meaningless to give him authority to which people may appeal[100].

To find if Judge is really powerless, we should look into traditions but in all the decision of Holy Prophet (PBUH) and his rightly guided Caliphs, the wording is either imperative as give her a divorce "or" separate from her "or" leave her, or it is stated that the Holy Prophet (PBUH) ordered the man to do this. And the narration of Ibn Zubair from Abu Abbas mentions that the Holy Prophet (PBUH) separate them. And the report from Jamilah bint Abi Salul contains the same words. Therefore, there seems no room for doubt that the Judge has right or authority to order for divorce in case of Khula[101].

The incident that happened in the time of Hazrat Umar, the second Caliph, and which has already been discussed throws light on this question. The Caliph had kept in confinement for three days and nights the wife who wanted a release from her marriage tie. After being satisfied with the

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100. Supra not 1, p. 65.
101. Supra note 1 P. 66.

genuineness of the wife's aversion for her husband he told the husband to divorce her. There was a possibility that husband might have refused to comply with Caliph's suggestion if it was only a recommendation because people were very free with him. The Caliph must have known that he could dissolve the marriage on the husband's refusal to do so, otherwise where was necessity to keep the wife in confinement. Supposing the husband had refused to divorce the wife and the caliph did not passes the right to dissolve the marriage then confinement of the woman would have been not only meaningless but an infringement of her freedom. Hazrat 'Umar', therefore must have felt sure that on husband's refusal to divorce his wife, he as a ruler or a Qazi could dissolve the marriage. This also supports the view that a Qazi can in case of necessity order the husband to divorce his wife[102].

However the Judicial trend seems to have gone under sea change in Pakistan and the present day courts hold the same view as was held by the Prophet (PBUH) and his companions in Khula-suit brought before them. The changing trend of the court finds expression in the noted case *Bilqees Fatima v's Najmul Ekram* wherein their lord ship of justice. Shabbir Ahmad, Justice B. Z. Kaikaus and justice Masud Ahmad held that if court arrived at the conclusion that the couple would not be able to maintain the limit set by God, it could then get Khula effected without the consent of the husband by ordering the wife to pay reasonable compensation to the husband.

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102. Supra note 8. P. 242

Modern legislation and Khula:

There has been neo-legislation in most of the Muslim countries regarding wife's right of obtaining Khula from her husband.

EGYPT:

Code of Personal status 1929 (Amended 1985)[103].

There appears to be no status law on the subject of Khula in Egypt. However, it is dealt with in accordance with the general Hanafi law as laid down under section 280 of the Act No. 31 of 1910. The sections 273 to 278 of the law dealing with Khula are given here under:

Section 273:

Accordance to section 273 of the said code, in case of disagreement between the married couple if they are apprehensive of not being able to perform the conjugal rights and fulfil the demands of marriage their effecting divorce or Khula shall be valid.

Section 274:

For the validity of Khula it is a condition that the husband who effects Khula must be capable of pronouncing divorce and the wife must be capable of being the subject of Khula.

Section 275:

According to the instant section, compensation in Khula is not condition. Hence, Khula effected with or without compensation shall take

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103. Tahir Mahmood; *Personal Law in Islamic Countries*; p. 39 1st ed. (1987) New Delhi.

effect, whether sexual intercourse with the wife has taken place or not.

Section 276:

This section lays down clearly that it shall be judicially correct for the husband to effect Khula to his wife for a higher compensation than what he had given to her.

Section 277:

Section 277 provides that effecting of Khula takes effect as irrevocable divorce whether it is with or without compensation. The intention of effecting three divorces therein shall also be correct. The Khula is not dependent on court's decree.

SYRIA:

Code of Personal Status, 1953 (Amended) 1975[104].

The Syrian law incorporates the Islamic doctrine of Khula under which a wife can persuade the husband to divorce her by accepting a consideration. As contained in the Qanun al-Ahwal al-Shakhsiyah, 1953, following are the relevant provisions of law relating to Khula that are in force in Syria.

Section 94:

This section contains that every divorce take effect as a revocable divorce except the one completed by three pronouncement or that pronounced prior to the consumption of marriage or effected for consideration i.e. Khula. It means that Khula effects an irrevocable divorce.

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104. Ibid. pp. 145-46.

Section 95:

According to this section it is a condition for the validity of Khula that the husband who effects it must be capable of pronouncing divorce and the wife who is affected with Khula must be capable of being subjected to it. If the wife has not attained the age of discretion and she is the subject of Khula, the payment of compensation for Khula except in the case of an agreement with the guardian of her property is not incumbent upon her.

Section 96:

According to section 96, it shall be valid for each of the couple to revoke his or her proposal before its acceptance by the other.

Section 97:

This section provides that everything, which is legally acceptable, may be valid compensation for Khula.

Section 99:

Section 99 provides that if parties to Khula at the time of its being effected do not mention anything to the contrary they shall be absolved of the rights of dower and of maintenance against each other.

Section 100:

Section 100 lays down if parties to Khula specifically stipulated that there will be no compensation, in case of the wife obtaining such Khula shall come under the description of a simple revocable divorce.

Section 101:

According to the rule contained under section 101 maintenance of iddat shall neither laps nor the husband shall be relieved of it, unless there is an agreement to the contrary in the contract of Khula.

MORACCO:

The Code of Personal status 1957[105].

The Maliki law of Khula is enforced by the Morocco code of personal status with emphasis on the free desire of wife in such a transaction. It is, however, only after the completion of twenty-one years of age that a wife can enter into an agreement of Khula. Further the consideration in a transaction of Khula should not prejudice the right of the children. It is however, lawful for the married couple to agree on divorce by means of Khula. The wife, who has attained the age of discretion, can obtain Khula. If she has not attained the age of discretion and she obtains Khula, it shall take effect as divorce and the payment of compensation shall not be due on her without the consent of guardian of her property.

PAKISTAN:

There is no specific statutory law regarding Khula in Pakistan. Hence, the court were in great difficulty before the decision by the supreme court of Pakistan in Khurshid Begum case (PLD 1967 SC 97) in applying

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105. Ibid P. 117.

correct law. However, the apex court of the Pakistan in the instant case finally laid down the law by holding that the wife is entitled to Khula as of right, if she satisfied the conscience of the court that it will otherwise mean forcing her into a hateful union. Where the husband disputes the rights of the wife to obtain separation by Khula, it is obvious that some third party has to decide the matter and consequently, the dispute will have to be adjudicated upon by the Qazi with or without the assistant of Hakams. The wife is entitled to the dissolution of marriage on restoration of what she received in consideration of marriage if the judge apprehends that parties will not observe the limits of God.

Concluding Remarks:

The discussion on Khula makes it clear that Islamic law maintains a balance between the rights of man and women. It is an error on the part of its follower that they have in actual practice deprived women of rights of Khula. Contrary to the principles of Shariah, we have left Khula to the will of the husband. This has led to and is even leading to the denial of justice to women for which law promulgated by Allah and his Messenger is not to be blamed. If this right of the women can be rehabilated even today many of difficult problems plaguing our marital affairs will be solved and most of them will not arise at all.

The factors that have practically robbed woman of right of Khula is the mistaken belief that law-giver has left Khula entirely to the spouses and

court has nothing to do with it unless the matter is submitted to it. The result is that it is only upto the man to grant or deny woman a Khula. If the women wants Khula and husband out of selfishness or sheer mischief does not want this, the woman finds no remedy in sight. This situation is contrary to the intention of lawgiver. The lawgiver had no intention whatever to make one of the parties to marriage bond helpless and place all powers in the hand of other party. Had it been so the lofty moral and cultural objectives associated with the marriage would have been meaningless.

It has already been explained that Islamic Shariah bases marital bond on the principle that so long as this bond can be maintained with moral purity, love and compassion, it is laudable and necessary to strengthen it and reprehensible to break it. When this bond became a source of moral transgression for both or one of the spouses or in place of love and compassion it gets permeated with hatred and disgust, its dissolution becomes necessary and its continuance runs counter to the objective of Shariah. To serve this basic principle, the Shariah has equipped both the parties to the marriage bond with a tool with which they can solve their problems. In case the marriage tie becomes unbearable the tool given to the husband is the divorce which he is free to use subject to the divine rules contained in the Holy Book. On the other hand, the woman is equipped with a legal tool of Khula. The procedure laid down for the use of this tool

is that in case she wants to do away with marriage bond, she must first put the demand before the husband. If he turns it down, she must have recourse to the court.

From the above discussion it can be safely concluded that Khula is basically a right of wife and the permission of the husband or his consent to it is not necessary for dissolution of marriage under Khula because the court can give effect to an offer of Khula by wife when it comes to the conclusion that parties would not be able to observe limits prescribed by God. However, the Qazi or court has power to redress a wrong and so if it finds that a marriage has proved a failure on account of the husband's misconduct, he has to separate the spouse by effecting dissolution. As a general rule if Qazi or court finds that husband is at fault, he shall order the husband to divorce his wife and husband shall become liable for the payment of her dower if not already paid. If it is wife who is found to be at fault, the Qazi shall dissolve the marriage under Khula and wife shall have to pay such compensation to the husband as may be fixed by the Qazi or court. A person is considered to be at fault when he or she does not follow law laid down by Allah or when transgresses limits fixed by Allah.

Part – B

(B) DIVORCE BY MUBARA'AT: A RIGHT TO SEPARATION BY MUTUAL CONSENT

Conceptual Analysis:

It has been widely impressed upon from the ages that the greatest defect of Islamic matrimonial law is absolute and unilateral power of divorce given to the husband to dissolve the marriage bond by pronouncement of verbal formula of divorce with or without any cause. The allegation is rebuttable, for, among various religions, the Islam has been the first and foremost divine religion to provide for a divorce by mutual agreement of the spouses from where it was adopted by other legal systems. It is now recognised as one of the forms of judicial divorce under several other laws applicable in India and other countries. In Muslim law, the dissolution of Marriage by mutual consent of the parties to the marriage takes the form of either Mubara'at or Khula. Though the incidents of two look somewhat similar but they are indeed quite different from each other. The basic principles underlying Mubara'at are reciprocality and a bilateral desire to get rid of the marital bond [1].

So, when the husband and wife with their mutual consent and desire obtain release and freedom from their marital tie, it is called Mubara'at

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1 Tahir Mahmood; *The Muslim Law of India*: p. 110 (1980), Law Book Co. Allahabad.

(Mutual freeing). It takes effect as one irrevocable divorce without the aid of court.

The literal meaning of the word Mubara'at is obtaining release from each other. The proposal in Mubara'at, may be made either of the two, the husband or wife and with its acceptance by the other, marriage is completely dissolved. No Qazi (Judge) is required to pass any decree for the same.

The term Mubara'at, in law, signifies mutual discharge from the marriage tie. As Fyzee puts it, while in Khula the requests proceeds from the wife to be released and the husband agrees for certain consideration, usually the Mahr, in Mubara'at apparently both are happy at the prospects of getting rid of each other. No formal form is insisted upon for Mubara'at by the Sunni Jurists. The offer may come from either side. When both the parties enter into Mubara'at all mutual rights and obligations come to an end [2].

Sunni Law:

According to Sunni law Mubara'at as a matter of fact is a mutual agreement of the husband and wife to dissolve the marriage which becomes effective by the pronouncement of divorce by the wife under the agreement. Hence, if the married couple for some reasons mutually agree to dissolve their marriage contract, they are without the intervention of the court

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2 Asaf A. A. Fyzee; *Outlines of Muhammadan Law*; p. 164 4th ed. (1974), Oxford Press New Delhi.

entitled to do so. Mubara'at with respect to its effect like Khula is one irrevocable divorce [3].

Shia Law:

According to Shia law, it is necessary that both the parties should find the matrimonial relationship irksome inorder to justify the parties entering into a Mubara'at. According to them, Mubara'at is the mode of dissolving the marriage tie which has become irksome to the husband and wife by relinquishing any claim which one may have against the other. Viewed in this respect, there does not seem to be much difference between the doctrine of two sects [4].

According to Shia Law, in Mubara'at also, the divorce must be pronounced expressly. The expression of Mubara'at is, "I have discharged you from the obligations of marriage for such a sum, and you are separated from me. "If the husband were simply to say, without using the word, "I have discharged you", the entire proceeding would be invalid; whilst if he says Anta talikum, without using expression about the "discharge", it would take effect as a talaq and he would be liable for dower. The Shariah, however, adds that when there is inability to use the Arabic language or when the parties are not congnisant of the technicalities of the law,

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3 Ibid.

4. Syed Ameer Ali; *Muhammedan Law*, Vol. II, P. 476, (1986), Kitab Bhawan New Delhi..

attention must be paid to their intention. If it be clearly evident from their conduct and their words that "a mutual release" is intended, it would take effect as such, though the exact expression may not have been used [5].

According to Shia Law Mubara'at, as a matter of fact, is a mutual agreement of the husband and wife and is similar to Khula. The only difference is that in Khula it is only wife who bears aversion for the husband but in Mubara'at the aversion is mutual. In Mubara'at it is not lawful for the husband to take from the wife consideration greater than the dower paid by him. It is necessary in case of Mubara'at to indicate a separation between the two by use of some word which indicate divorce [6].

In *Khursheed Bibi v/s Mohd. Amin* [7] it was held that when both the husband and wife feel aversion for each other and they dissolve their marriage by agreement, it is called Mubara'at. It was further observed that Mubara'at like Khula is dissolution of marriage by agreement. The difference between them is that when aversion is on the side of the wife and she gives the husband consideration for separation, the transaction is called Khula. When the aversion is mutual and both the parties desire separation, the transaction is called Mubara'at. The offer of separation in Mubara'at may proceed either from the wife or from the husband and as soon as it is accepted by the other party, dissolution is complete. In such case no

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5. Ibid.
6. Ibid.
7. P.L.D. 1967, Supreme Court, 97.

reference to court is necessary and the matter is settled by agreement between the parties.

Therefore, where a suit filed by the husband for restitution of conjugal right has been decreed but as against that wife's suit claming dissolution of marriage had been dismissed by the trial court, it was held that it was wife who sought severance of the marital tie and not the husband and, therefore, in the circumstances divorce ultimately agreed upon by parties was not Mubara'at but a Khula [8].

Effect of Mubara'at:

The effect of Khula and Mubara'at are that whatever rights are created between husband and wife on account of marriage contract lapse and couple are exonerated from obligations owing to each other. It is said in Khulasatul Fatwa that they are not liable to be exonerated if divorce is effected for consideration. Al-Kasani is of the opinion that Khula or Mubara'at effected for compensation resembles divorce effected for consideration and it is an established rule that rights of person do not lapse unless they are made to lapse by him. Hence only those rights shall lapse in Khula that are mentioned in agreement of Khula or Mubara'at but all those debts which are not due on account of marriage contract shall not lapse[9].

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8 P.L.D. 1964, Supreme Court, 456.

9 Tanzil-ur-Rahman; *A code of Muslim Personal Law*; Vol. 1st P. 554, (1978), Karachi-Pakistan

Therefore, the wife's dower, if not paid, and the maintenance allowance for the period of her probation on account of Khula being effected shall not be annulled except when there is some agreement to the contrary between the husband and the wife but not with standing any agreement to the contrary, the house in which wife resides at the time of Mubara'at her right of residence therein shall continue during the term of probation at the cost of husband [10].

Hanafi View:

It is written in "Al-Mukhtasar" of Al-Quduri that according to Imam Abu Hanifa, the husband and wife, in case of Khula or Mubara'at is effected, become exonerated from all the obligations created under the marriage contract. Indeed, the obligations due to reasons other than the marriage shall not lapse [11].

Imam Al-Shaybani's View:

Mohammed Al-Shayabani does not agree with Abu Hanifa on this point. According to him the rights without being mentioned cannot lapse. According to him, therefore, in Mubara'at or Khula in either case, all the rights under marriage contract unless expressly mentioned by both shall not lapse [12].

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10. Ibid.
11. Ibid. p. 555.
12. Ibid.

Imam Abu Yusuf's View:

Imam Abu Yusuf agrees with Imam Mohammed in case of Khula, that is to say, according to him as well, in case of Khula the rights without being specifically mentioned cannot lapse. But he agrees with Abu Hanifa in the case of Mubara'at. The rights, in the case of divorce by mubarat, that are created between the couple under the marriage contract do lapse[13].

Thus, on examining various authorities it can be safely concluded that opinions of Imam Abu Yusuf and Muhammad in the matter of Khula are more sound and acceptable and the opinion of Imam Abu Hanifa and Abu Yusuf on the question of Mubara'at appear to be more correct. In other words, only the non-financial commitments that are established on account of marriage contract shall automatically lapse on Khula or Mubara'at but husband shall not be exonerated of the liability of the financial rights, such as, dower and maintenance except when the wife agrees to it at the time of Khula being effected. Then, in the case of Mubara'at the husband and wife shall be deemed to be exonerated of the entire financial or non-financial commitments that existed during the subsistence of marriage between them, except when there is an agreement to the contrary[14].

As regards the wife's right of maintenance during the period of probation (Iddat) is concerned, it does not lapse in Khula or Mubara'at unless agreed upon between the husband and wife. Indeed so far as the right

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13. Ibid.
14 Ibid. p. 556.

of residence of the wife during Iddat is concerned, it cannot be given up even by mutual agreement. This is a religious obligation ordained by God by who commands:

> *"O, Prophet (PBUH) when ye Divorce women, Divorce them at their prescribed periods; And fear Allah your Lord. And turn them not out of their house; Nor shall they (themselves) leave Except in case they are Guilty of some open Lewdness"*[15].

Thus, Allah in the instant verse has clearly decreed not to turn the divorced wife out of the house so that she, in pursuance of religious directives may, as of right, pass her period of probation there. This rule on social grounds too is highly commendable.

However, it is lawful for the spouses to agree to Khula or Mubara'at on the condition that the wife shall be responsible to maintain a child or children as the case may be, born of the marriage during the period when the child is a minor. But it is a necessary condition of such agreement that the period during which the wife is made responsible for their maintenance should be specified. If the period has not been specified, the condition shall not be valid and the wife shall not be responsible for maintenance of the minors. There is, however, an exception to this rule. In case of an infant if no period is specified the condition shall not be valid because it is presumed that she has to suckle the child for the usual period of two years[16].

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15 Holy Qur'an; LXV:1.
16 Supra note 2 p. 166.

CHAPTER – V

DELEGATION OF DIVORCE : WOMAN'S RIGHT TO DECLARE DIVORCE

Conceptual Analysis:

Under Islamic Matrimonial law, a husband can divorce his wife without the intervention of the Court or Qazi. However, he can either exercise the right of dissolving the marriage himself or appoint an agent to exercise this power on his behalf or delegate to his wife. Such a delegation of power of divorce to the wife is called Tafwid and is well recognized in Muslim Law[1].

The meaning of expression "Delegation of the right of Divorce" is the entrustment with the wife by the husband of the right to act as her husband's delegate in effecting divorce to herself. Hence, wife's making it a condition with the husband, at the time of her being contracted into marriage, that she shall have authority of effecting divorce to herself is legally valid. Likewise, delegation of authority by husband to the wife at any time during married life; effecting divorce to herself is also valid if the wife at the time of marriage contract acquires the right from her husband of effecting divorce or she becomes entitled to this right after the marriage contract, she may, by exercise of this right and effecting divorce upon herself,

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1- K.N. Ahmad; The Muslim Law of Divorce: p. 183; (1984), 1st ed. Kitab Bhawan, New Delhi.

break of marital relationship and this divorce shall be as effective as that pronounced by the husband[2].

According to the Hedaya, Tafwid al-Talaq or delegation of divorce, is where the husband delegates or commits the pronouncing of divorce to his wife, desiring her to give the effective sentence, and it is comprehended under the three different heads, option, liberty and will[3].

Although the power to give divorce belongs primarily to the husband and he may either in person repudiate his wife or he may delegate the power of repudiating her to a third party or even to the wife herself, such a delegation of power of the divorce is technically called Tafwid or delegation of divorce. If the man says to his wife "choose", (thereby meaning divorce) or "divorce yourself", the woman has power to divorce herself so long as she remains in the specific situation in which she received it; but if she moves or turn her attention to anything else, the power thus vested in her is done away, and her option no longer remains, because the exercise of the optional power thus committed to the woman is held, by all the

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2- The Durr-Ul-Mukhtar: English Translation by B.M. Dayal; p. 172, (1992), Kitab Bhawan, New Delhi.

3- The Hedaya: Translated by Charles Hamilton; Vol. 1, p.224, (1985), Kitab Bhawan, New Delhi.

companions of Holy Prophet (PBUH), to be restricted to the specific situation in which it is received[4].

Thus the husband under Muslim law has the power to delegate his own right of pronouncing divorce to some third person or to the wife herself. A stipulation that under certain specified conditions, the wife can pronounce the divorce upon herself has been held to be valid, provided first, that option is not absolute and unconditional and secondly that conditions are reasonable and not opposed to the public policy of Muslim law. Therefore, an antenuptial agreement by a Muslim husband in a Kabinama that he would pay separate maintenance to his wife in case of disagreement and the wife would have the power to divorce herself in case of the failure to pay maintenance for certain period is not opposed to the public policy and is enforceable under Muslim law. The wife exercising her power under agreement must establish that conditions entitling her to exercise the power have been fulfilled. However, the delegation of the power of divorce or Talaq-e-Tafwid is perhaps most potent weapon in the hand of a wife to obtain her freedom without intervention of any court and is now beginning to be fairly common in India. An agreement by which the husband authorises to his wife to divorce herself from him in the event of his marrying a second

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4. Ibid.

wife without her consent has been repeatedly held to be both valid and irrevocable[5].

Classification of Delegation of Power:

The Muslim Jurists have classified the delegation of the power of divorce by husband into three classes, namely,

- Tafwid, i.e. delegating to the wife power of divorcing herself;
- Tawkil or agency i.e. appointing an agent to pronounce divorce; and
- Risalah or messengership i.e. commissioning a person to divorce the wife.

Tafwid:

The wife to whom the power is delegated exercises it in respect of her own person and has absolute right to exercise the power or not, as she may choose[6].

Tawkil:

In Tawkil the husband appoints an agent to divorce his wife on his (the husband's) behalf. The agent exercises the power delegated to him in respect of another, that is, the wife. He has no authority to

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5. Asaf A. A. Fyzee: Outlines of Muhammad Law; p. 159, 4th ed. (1976), Oxford University Press, Delhi.
6. Dr. Tanzil-Ur-Rahman: A code of Muslim Personal Law; Vol. I; p. 339 (1978); Karachi – Pakistan.

continue the marriage, as such power has not been given to him but can only divorce the wife[7].

Risalah:

In Risalah the husband appoints a person, his messenger, to convey his message to wife that he has delegated his power of divorce to her (wife). The power given by Tafwid cannot be revoked but other two i.e. Tawkil (agency) and Risalah (Message) can be revoked by the husband so long as it has not been exercised[8].

Religious sanction to Doctrine of Tafwid:

Holy Qur'an:

All the Sunni schools of law recognise the doctrine of Tafwid al-Talaq. According to them the doctrine of delegation of power of divorce is based on an incident mentioned in Holy Quran wherein the Prophet (PBUH) told his wives that they were at liberty to live with him or to get separated from him as they choose. Thus it is stated in Surah Al-Ahzab of the Holy Qur'an:

> *"O' Prophet say to thy consorts:*
> *If it be that ye desired the life of this world, And its glitter, then come I will provide for you Enjoyment and set you free in a handsome manner*[9].

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7. Ibid.
8. Ibid. p. 340.
9. Holy Qur'an; XXXIII: 28.

The Holy Qur'an further says in this regard:

> *"But if ye seek God And His Apostle,*
> *And the home of Hereafter,*
> *Verily God has prepared for the well-doers*
> *amongst you a great reward*[10].

Explaining the instant verses, noted Islamic Jurists Maulana Syed Abul A'Ala Maududi writes that it means O' Prophet (PBUH), say to your wives "If you seek the world and its adornment, come I shall give you of these and send you offing good away. But if you seek Allah and his messenger and abode of the hereafter, you should rest at assured that Allah has prepared a great reward, for those of who you do good[11].

It is explained by Muslim jurists that Prophet (PBUH) had, in the obedience to the above injunctions of the Quran, empowered his wives to choose between living with him or a separation: that they might either get their marriages dissolved or choose their continuation. Hazrat Ayesha has explained that we, the wives, chose the Prophet (PBUH) that is we preferred the continuation of marriage, and so the marriages were not dissolved. It is inferred from this tradition that a husband can lawfully delegate to his wife the power to dissolve the marriage, if she so chooses[12].

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10. Holy Qur'an; XXXIII: 29.
11. Syed Abul A'Ala Maududi: *The Holy Qur'an*; Translation and brief notes with Text, P. 71, 2nd, ed. (1987), Islamic Publication Delhi.
12. Supra notes 6 p. 340.

Ahadith:

It is narrated by Hazrat Ayesha that Allah's messenger gave us the option to remain with him or to be divorced and we selected Allah, the Almighty and his messenger. So giving us that option was not regarded as divorce[13].

Narrated Musruq: I asked Hazrat Ayesha about option. She said, "the Prophet gave us the option. Do you think the option was considered as a divorce. I said, " it matters little to me if I give my wife the option once or a hundred times after she has chooses me[14].

Imam Muslim narrates that Hazrat Ayesha reported; when the Messenger of Allah (PBUH) was commanded to give option to his wives, he started it from me saying; I am going to mention to you a matter which you should not decide in haste until you have consulted parents. She said that he already knew that my parents would never allow me to seek separation from him she said: Then he said: Allah, the exalted and glorious, said; Prophet say thy wives; If ye desired this word's life and adornment then come, I will give you a provision and allow you to depart a goodly departing; And if he desire Allah and His Messenger and the abode Hereafter, then Allah has prepared

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13. *Sahih-Al-Bukhari*; Translated by Dr. Muhammad Muhsin Khan, Vol. VII, p. 137 (1984), Kitab Bhawan New Delhi.
14. Ibid.

for the doers of good among you a great reward she is reported to have said; About what should I consult my parents, for I desire Allah and His Messenger and the Abode Hereafter. She (Ayesha) said; then all the wives if Allah Messenger did as I had done[15].

This shows on the one hand the Holy Prophet's (PBUH) keen sense of justice and, on the other hand, intense love of his wives for him. All the wives of Holy Prophet (PBUH) have strongest desire to keep him in their respective apartments for maximum time in order to receive the greatest blessing from his blessed company. The instant tradition also set a precedent that even if the power of divorce has been delegated to the wife, she should not exercise it in haste without consulting the senior male members of the family.

Thus, in Talaq-e-Tafwid, though it is the wife to whom the power is delegated who exercises the power of divorcing and the divorce in the eye of the law is made by the husband. Thus, when a wife is delegated the power of divorce and in the exercise of that power she pronounces the divorce, the power is exercised on behalf of the husband who had delegated it to her and, therefore, in law it is a Talaq of the wife by the husband.

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15. *Sahih Muslim*, Translated by Abdul Hamid Siddiqi, Vol. 2nd P. 761 (1978) Kitab Bhawan New Delhi.

Classification of Tafwid:

The Muslim Jurists have divided the expression Tafwid by which the power is delegated to the wife into three classes, namely –

1 **Ikhtiyar or Option** i.e. giving the choice.

2 **Amr-Ba-yed or Liberty** i.e. putting her business in her hand.

3 **Mashiat, or Will** i.e. giving her power to do as she pleases

1. Ikhtiyar or Option:

The delegation of power of divorce by the husband to his wife by means of Ikhtiyar confers on the wife the option of divorcing herself but it restricts the exercise of the power to the precise place or situation in which she was the recipient of the option. When a man says to his wife "choose thyself" thereby meaning divorce or divorce yourself. The woman shall have power to divorce herself so long as she remains in the specific situation in which she received it, but if she moves or turn her attention to anything else, the power thus vested in her is done away, and her option no longer remains because the exercise of the optional power thus committed to the women is held, by all the companions, to be restricted to the specific situation in which it is received and also because this species of delegation is transfer of power, not commission of agency and to give effect to the former, the reply is required on the spot declaration. The right of the

option of the women is annulled upon the instance of her rising from her feet, as that circumstances proves her rejection of it. And where a husband thus addresses his wife, an intention of divorce is a condition requisite to the effect, because the word "choose" is one of the implication of divorce, as it is capable of two constructions, by one it desires the woman to choose house-herself and by another choose her clothes and so forth: and if she chooses herself, a divorce irreversible takes place[16].

Analogy would suggest, in this case that from choosing herself nothing whatever should ensue, although divorce would be the intention of the husband, because he cannot himself effect divorce by use of such words; that is to say, if he were to say to his wife "I have chosen myself from you" nothing whatever would follow, and consequently how can be give a delegation of this natures. But here divorce takes place upon a more favorable construction, for two reasons; Firstly, all the companions agree that divorce takes place from the use of this expression. Secondly, the husband has it at his option either to continue the marriage with his wife, or to put her away, and hence it follows that he may constitutes her his substitute with respect to that rule; and where the woman is left to her option

16- Supra note 3, p. 244.

and says "I choose myself", a divorce irreversible takes place, because the woman's choosing of herself cannot be established but by her becoming sole and independent, which can only be the case in irreversible divorce, as where it is reversible the husband is at liberty to take her back without her consent and at any time during the continuance of her iddat and thus she would not become sole and independent on the instant, which the nature of the case required[17].

Thus, in case of Ikhtiyar or option one divorce only takes place, and not three, although the husband should actually have intended the latter option not being of different descriptions. If a man says to the wife 'choose', 'choose', 'choose' and she reply I have chosen the first or the second or the third, three divorces take place, under Hanafi law. According to Imam Abu Hanifa the intention of the husband is not requisite although the word here used be an implied expression, because his repetition of the word 'choose' proves his intention to divorce, as the option given to the woman is repeated only with that view. The two disciples of Imam Abu Hanifa, namely, Imam Muhammad and Imam Yusuf say that only one divorce takes place in either case; but they agree with Imam Abu Hanifa that intention is not essential for the reason above assigned and in the same manner if woman were only to reply I have chosen,

17. Al-Haj Muhammad-Ullah: *The Muslim Law of Marriage*, p. 68; (1986) New Delhi.

it is effective of three divorce. And so also if she were to say I have chosen a choice. This is admitted by all the Jurists; because where she only says, I have chosen a choice. This is admitted by all the doctors; because where she only says, I have chosen, it is productive of three divorces and consequently, when she speaks in a way to give this additional force, it produces the same a fortiori and if she were to reply, I have divorced my self or I have chosen myself with respect to one divorce, one divorce reversible take place. However, when a man addressing to his wife says, "one divorce is at your option", or choose to single divorce and she replies I have chosen myself, one divorce of reversible nature takes place, because the man has given the woman an option so far as one divorce is concerned and expressing it in direct terms, the divorce proceeding from it is reversible[18].

The delegation must refer distinctly to the person to whom the power is entrusted and therefore it is stated to be necessary that where the husband uses the expression "choose" it is requisite that personal pronoun self' be mentioned either by the husband or the wife. For example, if a man said, choose yourself or choose a repudiation and women answer, I choose, it would amount Talaq or, if he said, choose, and she answered, I have chosen myself it would

18. Supra note 3 P. 48.

be sufficient. But if husband were merle to say, choose, and she replied I have chosen, divorce does not takes place because the effect of divorce is established by all the doctors on the condition of mentioning of personal pronoun by one of the parties[19].

2. Amr-ba-yed or Liberty:

In a delegation of liberty, divorce takes place according to the number mentioned by the wife independent of the husband's intention and the divorce which follows is irreversible. If, for example, a man says to his wife "your business is in your own hands, intending three divorces, and the woman answers. "I have myself with one choice, three divorces take place. The proof of this is drawn from the nature of these expressions in their original idiom. But if the woman were to reply I have divorced myself with one divorce or I have chosen myself by one divorce, one divorce takes place and this divorce is irreversible, although the reply be delivered in express and not in ambiguous terms, because it bears relation to the words of the husband, which being an implication, amounts to a delegation of irreversible divorce and not of reversible divorce. The reason why an intention of three divorce is admitted in the present instance is that the word "your business is in your own hands" are capable of both a restrictive and an extensive construction, and hence may imply three

19. Ibid, p. 249.

divorces, as well as one, an intention to that effect, therefore holds good since that is one of the senses in which the word may be taken contrary to the expression considered in preceding section 'chosen' that being incapable of bearing an extensive construction[20].

The delegation of liberty may be restricted to a particular time or to several different specified periods of time, if a man says to his wife, your" business in your own hands this day and after tomorrow", the night is not included and if the woman rejects the liberty thus given to her for this day, it is with respect to this day annulled but it still remains to her for the day after tomorrow, because the husband has expressly specified two particular periods with intervention of a similar period to which the liberty does not extend and hence it appears that these are two distinct liberties and the rejection of one does not amount to a rejection of other and both amount only a single liberty. This being analogous to a case where a man says to his wife "you are divorced this day and the day after tomorrow which implies one divorce only and not two and hence, in like manner, one liberty only is implied. But to this it may be replied that divorce is not of a nature to admit restriction to any particular time where as liberty is capable of such restriction and hence that which regards first period mentioned is restricted to that period and that which regards the

20. Supra note 17, p. 70.

second period commences denovo[21].

Thus, in Amr-ba-yed also it is necessary to use the word self or some analogous expression. As in case of express delegation (Ikhtiyar) the husband has no power to recall the authority once entrusted. The only difference between the two is that in Ikhtiyar, the intention to give an irrevocable divorce at once is not valid. Where as in Amr-ba-yed it is when a man tells to his wife " thy business is in thy hands", his intention being to give her the power of divorcing herself, and she is present and has heard what he said, the power is in her hands whilst she continues at the place. If she was absent, and the option were given in general terms, she may exercise it at any time whilst at the place where the intelligence reached her. But if it were restricted to the particular time, and intelligence reached her before the expiration of period, she has only the remainder of time for the exercise of power, whilst if the time has expired, there is no option. When a husband does not intend to divorce by these words, "Thy business is in thy hands", they are of no avail except when uttered in anger or in conversation regarding Talaq[22].

3. Mashiat or Will:

The expression Mashiat or pleasure or option means that it

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21. Ibit. p. 71.
22. Syed Ameer Ali; *Muhammadan Law*; Vol II, P 457. (1986) Kitab Bhawan New Delhi.

depends on the pleasure of wife whether to divorce herself or not to do so. Thus, the husband may say to his wife "meaning that he has given the power to her to divorce herself or not to do so as she may please. Mashiat is similar to the "Amr-ba-yed" or liberty form of delegation with the difference that in case of Mashiat, the exercise of the power is absolutely at the pleasure or the will of the party to whom power is delegated[23].

Therefore, where a man empowers his wife to divorce herself in express terms, the divorce, which follows, is reversible. Therefore, if a man says to his wife " divorce yourself intending one divorce and the woman replies I have divorced myself then a single reversible divorce takes place. And if she were to say " I have given three divorces, then three accordingly take place where such is the intention of the husband. The reason of is this that divorce being a general expression takes place in the lowest species, but like other generic nouns, it also applies to the whole. An intention of three divorce is admitted and, where there is no particular intention, a single reversible divorce takes place because the power of divorce is delegated to the wife in express terms and express divorce occasions a divorce reversible. If the husband should in this case intend two divorces, it is not admitted because a generic noun does not bear that

23. Supra note 1, P. 191.

construction were the woman is free but if she be a slave an intention of two divorce is admitted being considered as the whole with respect to her[24].

It is also wroth to mention here that power of divorce thus delegated to the wife by the husband under the doctrine of Mashiat or will cannot be retracted. Therefore, where a husband says to his wife, "divorce yourself", he is not at liberty to retract, as his expression involves a vow because he has, in this instance suspended upon the execution of it by his wife, and a now is an obligatory act, for which reason a man is not allowed to recede from it. The power may be granted generally. As, where a man says to his wife divorce yourself when you please. She is at liberty to divorce herself either upon the spot or at any time in future, because the expression used by the husband seems to be of general nature and extends to all the time and hence it is the same as if he were to say, " divorce yourself at whatever time you like. Where a man says to the another person, divorce my wife", the person so addressed may divorce her either upon spot or at anytime and the husband may also retract, because this is a commission of agency and, therefore is neither absolute nor restricted in point of place. Contrary to it where the husband says to his wife "divorce yourself", this being a transfer of power not

24. Ibid. p. 192.

commission of agency as the woman thus addressed acts from herself and not from another. But if a man says to another "divorce my wife adding, if you please", the man so empowered may divorce the wife upon spot only and here the husband may not retract. The argument of Islamic doctors is that the words of the husband are a transfer of power as he suspends the divorce upon the will of the person whom he addresses and he is the principle who act from his own will[25].

However, a wife who is empowered by the husband under the doctrine of Mashiat or will to give herself three divorces may give herself only one divorce but when she is empowered to give herself only one divorce, she can not give herself three divorces. For example, if a man says to his wife " give yourself three divorces but she pronounce upon herself one divorce only, one divorce takes place accordingly because having been empowered so far as three divorces it necessarily follows that she is enabled to give a single one. But where a man says to his wife " divorce yourself once" and she gives herself three divorces, nothing would take place, according to Imam Abu Hanifa. However, according to Imam Muhammad and Imam Yusuf, a single divorce takes place[26].

When the power of divorce under the doctrine of Mashiat is

25. Supra note 3, p. 258.
26. Ibid. p. 259.

expressed with an unrestricted practice in respect to the time of effecting divorce, it is perpetual, extending to all the time and palaces. If a man says to his wife, " you are divorced when you please" or "when ever you please" and she rejects his offer saying I am not desirous of it, her rejection is not final. Because, the power thus vested in her is not confined to the place or situation where it is delegated, on which account she is at liberty to use it either there or elsewhere. Because the terms when and whenever, are used with reference to all time and extends to every time indiscriminately and hence, the sense of expressions, "when you please" and whenever you please is at whatever time you please and they are therefore not confined to place. And if the woman rejects at present, still it is not a final rejection. Because her husband has empowered her to divorce herself at whatever time she pleases[27].

This rule is technical and what is necessary is that the wife should make it quite clear that she is divorcing herself under the power delegated to her. But of course there should be no ambiguity in the expression used by her. She must make it fully clear that she was dissolving the marriage and completely severing the relationship of the husband and wife. The wife has to address the husband if he is present. If he is absent then she has to inform him that she has

27. Ibid. p. 261.

divorced herself. When the husband vests this power in his wife, she does not become entitled to act on her own behalf but acts only as a representative or agent of the husband. Hence if she says to her husband, "I have divorced thee", then this statement will be ineffective because actually she represents the husband. Moreover, divorce is attributed to a woman and not to a man. She has, therefore, to use an expression like the following, "I am unlawful on thee", "I am absolutely separated from thee." "I divorce myself on thy behalf" or "I divorce myself under the power delegated to me be thee"[28].

Conditional Delegation:

The delegation of the power of divorce by the husband to his wife may either be conditional or without any condition. Just as the husband is entitled to pronounce the Talaq conditionally or contingently, so also delegation of power may be made subject to the fulfillment of any condition or happening of any contingency. There is nothing, whatever, unreasonable in the husband's delegation to his wife the power to divorce on the happening of the certain events. This is clear from the illustration given by the Muslim Jurists in connection with the delegation of the power of the divorce. Thus, for

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28. *Al-Fatawa al-Hindyah*. Vol. II p. 72, quoted by K.N. Ahmad; The Muslim law of Divorce P. 185 (1984), Kitab Bhawan, New Delhi.

example, the husband may authorise the wife to divorce herself if he marries another woman. In such a case the wife shall be entitled to exercise the power only when he marries another woman[29].

Similarly, where a husband authorize his wife to divorce herself on his failure to maintain her for a period of two years. He fails to maintain her for a period of two years. In such a case the wife shall become entitled to divorce herself on the fulfillment of the condition i.e. failure of the husband to give maintenance for stipulated period. It is however, necessary that in the instant case the wife should not have contributed to the breach of condition by the husband[30].

Judicial Trend:

In *Hamidullah V/S Faizunnisa*[31] an instrument was executed by the plaintiff upon his marriage with the defendant. Under the deed plaintiff agreed to allow the defendant to be taken to her father's house four time a year, and to erect a house for the defendant and to live with her there. He also agreed not to beat or ill-treat the defendant and to pay Rs. four hundred as dower money on demand. The agreement further stipulated that if plaintiff violated any of

29. Supra Note 17, p. 70.
30. Ibid.
31. I.L.R. 8, Cal. 327 (1882)

conditions contained in it, the defendant would have the power of divorcing herself from him. Sometime after the marriage, the defendant divorced herself alleging ill-treatment and refusal to pay dower money. The plaintiff thereupon sued the defendant for the restitution of conjugal right. The lower court gave the decree considering that Muhammdan law did not give the wife the power of divorce. In appeal against the order of lower court, the high court agreeing with the decision of lower court observed:

> *"The Muhammdan law on the subject which has been laid before us provides for the delegation of power of divorce by the husband to the wife on certain occasions by words of mouth, but it in no way, so far as it has been laid before us, limits the exercise of that power to those occasions. It would seem rather that, by providing how the wife should act, it recognises her power to divorce her husband, if he gives power to do so. We are aware of no reason why an agreement entered into before marriage between persons able to contract, under which wife consented to marry on condition that under certain specified conditions, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Muhammdan law. The court also observed that the condition under which it is stipulated that this power should be exercised by wife are certainly not opposed to the policy of Muhammdan law on the subject."*

In *Ahmad Ali v/s Saleh Khatun* Bibi[32] it was held that where the husband did not pay maintenance to the wife as stipulated in Kabinnama, the wife could exercise the right to divorce herself. But where the Kabinnama gave power to wife to divorce herself if husband did not give the wife maintenance for two year and the circumstances of the case showed that it was the wife who was to be blame for the husband's failure to provide maintenance, the wife had no right to effect a divorce in exercise of such power.

In *Ghul Nawaz Khan v/s Mst. Mahrunnissa*[33] it was held that under the dissolution of marriage act, non-payment of maintenance gives a wife right to seek dissolution of marriage and there is no reason why marriage cannot dissolved by exercise of delegated powers on failures to pay maintenance and dower. The court further observed that an agreement made, whether before or after of marriage, by which it is provided the should be at liberty to divorce herself in certain specified contingencies is valid if conditions are of reasonable nature and or not opposed to the public policy of Mohammedan law. When such an agreement is made the wife may, at any time of the happening of any of contingency, repudiate the

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32- P.L.D. 1952, Dacca 285.
33- P.L.D. 1965, Dacca 274.

marriage in the exercise of power and a divorce will then take effect to the same extent as if a talaq has been pronounced by the husband the power so delegated to the wife is not revocable and she may exercise it even after the institution of a suit against her for the restitution of conjugal rights.

In *Shrimati Ayatun Nissa Bibi v/s Karam Ali*[34] the question was raised whether a wife who has been given power under the marriage contract to divorce herself in the event her husband's taking second wife, losses her option by failing to exercise the power at the very moment she learns the news that he has done so. It has been held by the court that when the power is given to the wife by the marriage contract to divorce herself on her husband's marrying again, she is not bound to exercise her option at the very first moment she learns the news of her husband's taking second wife. The injury done to her is a continuing wrong and it is reasonable that she would have a continuing right to exercise the power. Thus, delay in exercising the right of divorce on the happening of the stipulated contingency does not imply a waiver on her part.

In *Mirzan Ali v/s Maimuna Bibi*[35] it was observed that when a wife seeks to exercise the power delegated to her to divorce herself,

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34. I.L.R. 36 Calcutta 23.
35. AIR. 1949, Assam, 14.

she must establish clearly that the condition under which she was authorised the exercise the power have been fulfilled.

From the above discussion it is clear that under Muslim law the delegation of the power to divorce by the husband to the wife may be absolute or its exercise may be subject to certain conditions. It is contended sometime in legal proceedings that absolute or unconditional delegation is not valid and the delegation of power of divorce by the husband to the wife must be subject to certain conditions. The difference in views lies in the fact that the Muslim Jurists consider that a husband is an absolute owner of the marriage and has unrestricted power to dissolve it and it is immaterial whether he exercise that power by himself or through an agent who may be the wife herself. The wife according to them, is a representative of the husband and so she can wield same power as can be exercised by the husband. The courts do not agree with the view and consider that wife cannot exercise an absolute and unrestricted power to dissolve the marriage. in This way they have been influenced by the conception of a Christian marriage as well as by law of contract relating to the agreements. Notice has not been taken in these cases of the fact that there is a great difference in the conception of the nature of a Christian marriage and that of "Muslim" marriage. A Christian marriage is indissoluble at the will of the parties to it. The

principle governing to it is that marriage is a voluntary union for life of one man and one woman to the exclusion of all others. A Muslim marriage, on the other hand, is dissoluble by a husband and under certain conditions by or at the instance of a wife or by mutual agreement of a husband and his wife. The Muslim law, therefore allows a provision in an agreement for a future separation and does not look as such an agreement. The fact that a provision of Muslim law is opposed to a provision in contract Act or of the English law or the English conception of marriage is certainly not a sufficient ground to nullify it, particularly as the Muslim are to be governed by their own personal laws in the matters of marriage and divorce. It may also be noted here that clause IX of the Dissolution of Muslim Marriage Act, 1939 provides that a marriage can be dissolved on any other ground which is recognise as valid for the dissolution of marriage under Muslim Law. It is quite clear from the Muslim authorities that a wife can dissolve her marriage regardless of the fact whether a condition is in restraint of marriage or is now considered unreasonable or opposed to the present public policy. Hence, no objection should be raised to the delegation to and exercise of such power by the wife[36]. The Dacca High court in

36. Supra Note 1, p. 196.

Aklima Khatoon v/s Mohib-Ur-Rehman[37] has also held that an unconditional delegation of the power of divorce is valid.

Capacity for delegation of divorce:

Husband's capacity:

A delegation to be valid must fulfil certain requirements. The husband must possess the same qualifications when delegating the power of divorce himself. He should be major and sane in order to be competent to lawfully delegate his power of divorce to his wife or to any other person. The majority will be determined by the provisions of Muslim law and not by the Indian Majority Act. Hence a person who is major under the provisions of Muslim law but a minor under the "Majority Act"can lawfully delegate to his wife or to another person the power to divorce. In *Marfat Ali Mirza v/s Zabeedunnissa*[38] it has been held by the court that even if parties are minors, consent on his or her behalf can be expressed by guardian for marriage who is legally authorised to make a valid contract of marriage.

In case of Tafwid the condition of sanity must exist at the time of delegation of power and any subsequent change in the mental condition of the husband who delegated the power of divorce to the

37. P.L.D. 1963, Dacca 602.

38. A.I.R. 1941, Cal. 657.

wife does not affect the validity of delegation. Thus, if a person delegates the power of divorce to his wife while in a sane condition but afterwards becomes insane, his subsequent insanity shall not invalidate the authority. However a minor cannot appoint an agent for delegating his power to divorce his wife[39].

Wife's capacity:

Under the Hanafi law the wife to whom the power of divorce is delegated need not be major or sane and the Muslim Jurists Justify this rule on the ground that a divorce given by a wife under the doctrine of Tafwid is some what akin to the conditional divorce which takes place on the fulfillment of the agreed condition, here condition being the exercise of power by the wife. It may also be said that when the wife divorce she does not do it in her own right but only on behalf of the husband, who is major and sane. Under the Hanafi law the power can be delegated to a minor or non-Muslim wife. But she can not exercise the said power unless she is sane and major for the purpose of Muslim law[40].

In *Marfat Ali Mirza v/s Jabeedunnissa*[41] it was held that if the wife herself wants to settle the terms with her husband, then she should be major as understood by Muslim law. If the wife be minor

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39. Supra note 3, at 489.

40. Ibid.

41. A.I.R. 1941, Cal. 657.

then her guardian can settle such terms with the husband on her behalf and she shall be entitled to the benefit of these conditions, even though she was not a party to the agreement.

The Shafi'i law is different from Hanafi law in this respect. Under the Shafi'i law the power of pronouncing divorce cannot be delegated to a minor wife. Under the Hanbali law the power to divorce can be delegated to a minor wife if she is competent to understand what is meant by divorce. If she cannot so under stand the power cannot be delegated to her.

Time of Delegation:

The power of pronouncing divorce may be delegated by the husband to the wife either at the time of marriage or subsequent thereto. If the power has been conferred before the marriage has taken place, it must be so intended as to take effect after marriage. Thus, under the provisions of Muslim law, the option of Talaq can be delegated at any of the three stages, namely:

a) Prior to the marriage; or

b) At the time of marriage; or

c) Subsequent to the marriage.

The Muslim Jurists hold that delegation of the power is perfectly valid at whichever of these stages it is given. The time of

delegation does not, under the Muslim law, affect the validity of delegation in any way. Most of the authorities on Muslim law have discussed the cases of delegation of the power to the wife after marriage. They have also given instances when the power was given prior to the marriage.

Judicial views as to the time of delegation:

The courts in general agree with the verdicts of the Muslim Jurists as to the first and second cases namely, when the power is delegated before or at the time of marriage. But they have differed with them in the cases where power is delegated to the wife subsequent to the marriage and have held such delegation to be invalid for the want of consideration. They have attached greater importance to the matter of consideration. It is contended that when an agreement has been executed or the terms have been agreed, inter-alia, conferring option of divorce upon the wife or future wife, before or at the time of marriage with the consent of parties, it is valid, because marriage itself is a sufficient consideration, and she can exercise this right over and above any other right that is conferred on her by the dictates of the Shariah or agreement of the parties. But, according to some decisions of the superior courts of

the pre-partitioned India, where an agreement is executed after a marriage, in the absence of consideration has been held invalid.

In *Abdul Phiroz Khan v/s Hussain Bibi*[42] a person had entered into an agreement with his wife and a quarrel arose between them and the husband entered into a second agreement with his wife's brother undertaking to carry on the terms of his previous agreement, it was held that latter agreement was nothing more than a promise as it was without consideration.

The courts are not, however, unanimous on this point and have expressed different views in different cases. The Oath Judicial commissioner's Court has distinguished the cases where an agreement is entered into at the time of marriage and where it is entered into subsequent to a marriage.

The Calcutta High court in *Mst. Fatima Khatoon v/s Fazal Khan*[43] has taken a different view and has held that an agreement under which the wife is given an option to divorce herself on behalf of her husband on breach of certain condition is valid and not opposed to the public policy, even when it is entered into subsequent to the marriage.

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42. 6, B.L.R. 728.
43. A.I.R. 1928, Cal. 303.

In another case, *Sabid Khan v/s Bilatunnisa Bibi*[44] Calcutta High Court held that such an agreement the conditions of which have been settled before the marriage but executed subsequent to the marriage is perfectly valid.

The Lahore High court in *Mst. Sadiqa Begum v/s Ata Ullah*[45] has also held such subsequent delegation to be valid and not opposed to the public policy. The Lahore High court in another case *Muhammad Amin v/s Amina Bibi*[46] held that there is ample authority to the effect that an agreement made before or after the marriage by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified valid condition is valid.

Under Muslim law the agreement shall not be invalid because it considers such agreement to be merely the appointment of an agent with the authority to do certain act under certain conditions. It attaches no importance to consideration or to its absence. But what is more important is the fact that before the actual solemnization of the marriage the prospective husband has no control over the prospective wife and it is only when the marriage has been performed that he gets a right to have some control over her. The Muslim Jurists are of the opinion that in agreements executed before or at the time of the

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44. 30, CLJ 510.
45. A.I.R. 1933, Lah. 885.
46. A.I.R. 1931, Lah. 134.

solemnization of marriage, it should be made clear that the agreement shall be applicable after the solemnization of the marriage.

The difference of opinion between the Muslim Jurists and the Courts is due to the difference in the point of view from which the matter is considered. The Muslim Jurists hold that the husband possesses the power to divorce his wife at any time he likes. He may exercise the power to dissolve the marriage by himself or he may appoint an agent to exercise the power on his behalf. It makes no difference as to who that person is. He therefore, can authorise his wife to exercise the power on his behalf. When the wife dissolves the marriage, she does not exercise the power in her own right but merely as an agent of the husband. It is therefore, immaterial according to them at what stage the power is delegated to her. They hold that it is only after the marriage that the husband can validly delegate the power to the wife. He can not delegate it before the actual celebration of the marriage. The delegation of a right to the wife necessarily involves the idea that man is possessed of a right which he is vesting in the wife. The prospective husband has no concern with or control over the prospective wife. He can, therefore, exercise no power over her, and when it is not possessed of the power, he obviously cannot delegate, it to the girl. If he execute any

agreement before the marriage, he has to make it clear that the agreement shall be enforceable only after the celebration of marriage. Thus, he has to state something like this, "when I am married to you then I shall be bound by the condition specified below". Or, when I am married to you then you shall have the power to dissolve the marriage on my behalf whenever you like. If there is no reference to the forthcoming marriage or if it is not made clear that the agreement shall be enforceable only after the marriage then according to the Muslim Jurists it shall be invalid and so ineffective. Thus, if he says in the agreement executed before the marriage. I am being married to you and I delegate to you the power of dissolving the marriage absolutely subject to the term in the agreement, then the agreement shall be invalid because being a stranger he has no right or control over the prospective wife and cannot exercise any control over her and so he can not delegate any right to her as he himself is not possessed of any of such rights. The Muslim Jurists do not attach any significance to the question of consideration. The courts that have differed with Muslim Jurists have based their judgements on the basis of "consideration". They have held that when an agreement delegating the power of divorce is entered into before or at the time of marriage, then the marriage itself forms its consideration, but when such an agreement is made subsequent to the marriage then

there is no consideration for the husband's delegation and so the agreement is invalid[47].

It may be submitted that law of delegation of the power of divorce is an integral part of the Muslim law of marriage and divorce and the Muslims are governed by their own personal law in these matters. The notion of consideration as expounded by the conception of English law or the Indian Contract Act, has little to do with the doctrine of the delegation of power of divorce (Tafwid al-Talaq) which falls within the domain of Muslim Personal Law of Marriage and divorce and it should be left alone to be so determined. Therefore, there is no reason why an agreement executed subsequent to marriage should not be allowed to govern the right and liabilities of the parties.

Time of Exercise of Power of Delegation:

In the absence of the condition the wife must according to the Hanafi Law exercise the power immediately she is invested with or receives the information that she has been so invested with the power. If it be subject to condition, then the wife can exercise the right subject to the condition.

It is stated by the author of the Hidayah that she must exercise

47. Supra note 6, p. 345.

her right in the same sitting and in the same posture in which she received the information. Stress is laid on condition to such an extent that if she was sitting when the power was given to her or when she received the information and then lies down or stand up before exercising her power then her right should be lost. Similarly, if she makes herself busy in some other occupation such as reading or taking her meals after being invested with the power and before exercising the same then too she loses her right[48].

It is explained that when her attitude shows that she is not keen on exercise of her right but if she will not lose wants the time to consult her father or to call witnesses, then her right shall not be lost on account of delay. She will not lose her right if she was standing when she receive the news of delegation and then sits down. It is explained that these act do not denote her lack of interest. On the contrary, they indicate her interest and desire to deeply consider over the matter. If the husband raises her up right or is intimate with her even by force then too she shall loose her right because, it is explained, she could have exercised the power to divorce herself immediately it was delegated to her so as to leave no chance to the husband to undo this delegation and her delay shows her lack of keenness in the matter, namely exercise of the power delegated to the

48. Supra note 1, P 213.

wife as a general rule is at present time made to depend on the occurrence or non-occurrence of the specified condition and so wife gets sufficient time to think over and decide the matter before-hand. In other case, the power is so delegated as to give the wife the power to make the advantage of its whenever she may so like and it is not obligatory on her to exercise it the moment the husband commits a breach of specified condition or conditions[49].

Nature of Tafwid al Talaq (Delegation of Divorce):

The divorce pronounced by a wife under her delegated authority shall be in the nature of a revocable divorce which may be revoked by her at any time during her iddat unless otherwise intended by the husband at the time of delegation. Therefore, the nature of the separation effected by a divorcee pronounced by a wife, under delegated authority generally depends on the expression used by the husband and its exercise by the delegatee wife. There is however, some difference of opinion in this respect among the different schools of thoughts.

Imam Abu Hanifa lays down that the separation effected by exercise of power of divorce by wife shall amount to an irrevocable divorce. He explained that if it be held to be revocable then it can

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49. Ibid. p. 214.

serve no purpose and the wife gains no advantage from the delegation. The argument seems to be quite sound and purposeful[50].

Imam Malik holds that when a husband authorises his wife to divorce herself, he shall be deemed to have empowered her to effect an irrevocable divorce. He explains that in such a case the object of husband's delegation is that the wife should be separated from him. Similarly, her object, when she exercises the power, is to be irrevocably separated from him. Imam Malik, Therefore, concludes that spouse would be separated irrevocably and so such shall be the effect of the exercise of the power by the wife[51].

According to one report Imam Shafi'i holds that separation effected in the case of delegation to the wife amounts to dissolution of marriage. But according to his later opinion, the category of the separation shall be that of divorce and its nature shall depend on the intention of the husband while delegating the power. If wanted separation to be effected irrevocably, the divorce effected shall be irrevocable. If on the other hand, he wanted to delegate power of revocable divorce, then only a revocable divorce shall result[52].

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50. Supra note 3, p. 356.
51. Ibid.
52. Ibid. p. 357.

Effect of Delegation by the Husband:

The effect of delegation of the power of the divorce by the husband to his wife is that she becomes authorised to exercise that power as a representative of her husband and the pronouncement of divorce by the wife amounts to her husband's pronouncing it. There is no difference between a husband agreeing that he shall be held to have divorced his when a certain contingency arises and a condition allowing the wife to divorce herself upon certain contingency arising[53].

The delegation does not divest the husband of the power of divorce and both he and his wife can exercise the power. Ibn Nujaym states, while discussing the subject of Tafwid or delegation of power of divorce to the wife, that a question arises here as to how can the husband exercise the power of divorce when he has delegated the power to the wife and so made her the owner of the divorce. He then explains on the strength of al-Kafi that what husband entrust to the wife is not the ownership of the divorce, but only the right to exercise the power of divorce and so he still remains the owner of divorce, hence, both husband and wife can effect a divorce. The husband is not divested of his power and he can exercise the power

53. Ibn Nujaym; Al-Bahr al-Raiq; Vol. III, p. 335, quoted by K.N Ahmad; *The Muslim* of Divorce p. 214 (1984)

as long as the wife does not divorce herself on his behalf [54].

The power of pronouncing divorce delegated by the husband to his wife is irrevocable, as an option conferred on her. However, there is a difference of opinion about the revocability of the authority of divorce delegated by the husband to his wife. The preponderant view, however, is that the husband after delegation to his wife of the right or option to divorce herself, cannot revoke it, because, wife then becomes the owner of the option in her own right. She may in her own discretion, exercise that option or not.

Modern Legislation and Talaq-e-Tafwid:

Islam gives to the parties to an intended marriage freedom of mutually stipulating any condition that is not repugnant to its law or social policy. The basic policy of Islam is not to impose on the parties any thing by force of law; beyond prohibiting a few thing specially it follows the rule of contractual freedom. The contracting parties can mutually opt out of anything which the law permit but does not make obligatory. Similarly, they can opt for something special, which is neither prohibited nor imposed by law. This is called Khaiyar al-Shart (option of the stipulation). The doctrine of freedom of marital stipulation is specifically recognized by legislation in Jordan, Morocco, Syria and Tunisia. All the lawful

54. Ibid.

condition mutually agreed upon at the time of marriage, as also an option reserved by the wife to dissolve the marriage if any such condition is violated, are judicially enforceable in these countries[55].

Egypt:

Personal Law on Status 1929 (Amended) 1985[56]

Section 2 of the code provides that a conditional Talaq which is not meant to take effect immediately shall have no effect if it is used only as an inducement to do some act or to abstain therefrom.

According to section 11(A), a man getting married shall declare his marital status in his application for registration of marriage. If he is already married, he shall disclose the name and address of his existing wife or wives. The registrar shall in this case inform them of the new marriage by registered post acknowledgement. A wife whose husband has married again can seek divorce on the ground of the matrimonial injury caused by it, making it impossible to live with him irrespective of fact whether or not marriage contract incorporates a stipulation giving her such a right. If the Qazi fails to effect the reconciliation between the parties he will grant an irrevocable divorce. The wife's right to seek a divorce under this provision will laps if she does not initiate action within

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55. Tahir Mahmood; *Personal Law in Islamic Countries*, p. 272, (1987), Academy Law and Religion, New Delhi.
56. Ibid. p. 283.

one year from the date on which she comes to know the second marriage or if she has consented to it expressly or impliedly. She will have, however, this right each time her husband married again. If new wife did not know at the time of marriage, the fact and requires no action forbidden by law, and which has been recorded in the certificate of marriage, compliance with it shall be obligatory as follows:

Where the wife has stipulated for something that gives her a right not forbidden by law and not affecting a third person's right e.g., that she will not be required to go out of station or that husband shall not marry another woman, or that she can divorce herself should she so desire or that she would live in a specified place the condition is valid and obligatory and if the husband does not fulfil it the wife can apply for divorce on that ground without loosing any of her rights resulting from marriage.

Where the husband stipulated for something that gives him a right not forbidden by law and affecting a third person's right e.g., if he stipulates that she will not go out for work or that she will live with him at his place of work the condition is valid and obligatory, and if the wife does not comply with it the marriage may be dissolve at the instance of the husband who will be absolved of his liability for her deferred dower and maintenance of Iddat.

Where the contract of marriage contains a condition which is repugnant to the object of marriage or requires an action forbidden by law e.g., where either party stipulates that they will not live together or that the other party must drink alcohol of the man being already married and comes to know of it subsequently, she can similarly seek a divorce.

Iraq:

Code of personal Status 1959 (Amended) 1980[57]

Article 6 (3) of the said code provides that lawful conditions stipulated in a contract of marriage shall be valid and must be complied with.

Sub-Clause (4) of the Article 6 says that the wife may claim dissolution of marital contract on the ground of non-compliance by husband of any such condition stipulated in the contract. Article 34(1) lays down that divorce terminate the bond of marriage when pronounced by the husband, or by the wife who has been assigned or delegated an authority in that regard or by the Qazi. No divorce shall be effective except when pronounced through the legally prescribed formula. An assignment shall be irrevocable in regard to reconciliation proceedings, arbitration and pronouncement of Talaq.

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57. Ibid. p. 57.

Jordon:

Code of Personal Status 1976[58]:

Article 19 of the said code lays down that where in a contract of marriage has been stipulated a condition for the benefit of either party which is not prejudicial to the objects of marriage or must not meet either of his or her parents the condition will be void but marriage will be lawful.

Law in Pakistan and Bangladesh[59]:

Section 8 of the Muslim Family Laws Ordinance 1961, deals specifically, with divorce by Talaq-e-Tafwid. This Section reads:

> *"Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise that by Talaq, the provisions of Section 7 of the said Ordinance shall, mutatis mutandis and so far as applicable."*

Section 7 of the Ordinance:

Section 7 of the said Ordinance, dealing with the pronouncement of Talaq by the husband reads:

"Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of Talaq in any form whatever, give

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58. Ibid. p. 80.
59. Ibid. p. 247.

the Chairman of the unit of local government, notice in writing of his having done so, and shall supply a copy thereof to the wife".

Clause (2) of the Ordinance says that whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may not extend to one year or with fine which may extend to Five Thousand Rupees or with both.

Clause (3) of the Ordinance provides that "save as provided in sub-section (5) a talaq, unless revoked earlier expressly or otherwise, shall not be effective unit expiration of ninety days from the date on which notice under sub-section (1) is delivered to the Chairman.

Clause (4) of the section 7, of the Ordinance says that "within thirty days of receipt of notice under sub-section (1), the Chairman shall constitute an arbitration council for the purpose of bringing about a reconciliation between the parties and the arbitration council shall take all the steps necessary to bring about such reconciliation.

Clause (5) of the section 7 of the Ordinance enjoins upon that if the wife is pregnant at the time the Talaq is pronounced, Talaq shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, end.

Clause (6) of the Section 7 of the Ordinance provides that nothing shall debar a wife whose marriage has been terminated by

Talaq effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for third time so effective.

From the combined reading of Sections 7 and 8 of the said Ordinance, it is clear that having pronounced Talaq the wife is required to notify the pronouncement to the appropriate public official and to her husband and that pronouncement will not becomes an actual divorce until ninety days have passed from the date of receipt by the official of such notification[60].

During the intervening ninety days, the pronouncement is revocable; the question is by whom is it revocable? As previously explained, the question of whether the husband has foregone his right of revocation depends on the wordings of delegation itself. If the husband has conferred upon the wife not merely the right to pronounce Talaq, or three Talaq, but not to dissolve the marriage effectively, completely, and extra Judicially by means of Talaq procedure, he must be held to have renounced any right of revocation of the Talaq or Talaq pronounced by her. In these circumstances, the revocation possible under Ordinance can be revocation by the wife of the pronouncement she herself recited[61].

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60. Lucy Carrll; Talaq-i-Tafwid and Stipulations in Muslim Marriage contracts; Legal theory – legislative provisions – Judicial Rulings; *Religion and Law Review* ,Vol. VI No. 1, p. 83 (1997).
61. Ibid.

Conclusion:

The above discussion of the doctrine of Tafwid al Talaq Leads to the conclusion that the delegation of the right of effecting divorce is, in fact, an option given to the wife for effecting divorce on herself. The giving of an option means offering a chance to his wife who is given option to pronounce to herself in appropriate circumstances and on her own volition. When the husband gives his wife the option of effecting divorce, he rather authorises his wife that she may effect divorce to herself and sever the relationship of the husband and wife between them, if she likes. It is evident that the wife, in such circumstances, acts in her own right. It means that the wife too can make the use of the husband's right, which is over the above and not in place of that of the husband, as it is in the nature of Khiyar (option). This view is fortified by the very verse surah Al-Ahzab Ayat 28 which is the basis of the right of the husband to delegate his right of divorce to his wife. That is why Jurists have termed this delegation as Khiyar al-Talaq which means that the wife is given option to divorce herself if she chooses.

Thus, the traditional Muslim Law recognise the delegation of the power of effecting divorce by a husband to his wife. According to Hanafis and Malikis, it is an irrevocable divorce; but under section

8 of the Muslim Family laws ordinance 1961 of Pakistan the divorce nevertheless be revocable by consent of the parties. It is a very important provision of Muslim law of marriage which enables a wife to safeguard her future married life. She can make a condition at the time of her marriage that husband should delegate his power of divorce to her so that she can exercise it i.e. divorce herself on his behalf, whenever she is not satisfied with his behaviour, or the husband commits a breach of terms agreed upon. Such a divorce by her will take effect as if a divorce had been pronounced by the husband himself.

As the Muslim husband has the right to dissolve the marriage by pronouncement of Talaq formula, he may delegate the right to exercise this power on his behalf to another person. Such delegation does not deprive the husband of his right to pronounce Talaq but merely means that two people are possessed of the power to dissolve the marriage by verbal formula. If the husband delegates to his wife the right to exercise the Talaq on his behalf in regard to her own marriage, she is assured of being able to terminate the marriage extra-Judicially and expeditiously while retaining her claim to the full amount of dower.

Like the husband's pronouncement of Talaq, the wife's pronouncement under the authority delegated to her by the husband (Talaq-i-Tafwid) dissolve the marriage without the intervention of the court. Nonetheless, question concerning such extra Judicial divorce may come before courts in various ways. A husband may answer his wife's suit for maintenance, for example, by alleging that he has divorced her by Talaq and is thus no longer financially responsible for her support. Similarly, wife may sue for her deferred dower o the ground that she has dissolved the marriage by Talaq-i-Tafwid. She may raise same argument in defense to a suit for restitution of conjugal rights brought by her husband or she may petition for declaration that marriage is no longer subsisting because of her exercise of delegated right of Talaq.

CHAPTER – VI

DIVORCE BY ILA: CONCEPT AND UTILITY

Conceptual Analysis:

Ila is not exactly a divorce, but has been treated as a form of divorce by the Muslim theologians and Jurists. It was a common practice in pre-Islamic days. Actually, before the advent of Islam, the Pagan Arabs had many special kinds of customs of oaths for each of which they had a special name in their language. Some of them related to sex matters, and caused misunderstanding, division or separation between husband and wife. Sometimes in a fit of anger or caprice a husband would take an oath by Allah not to approach his wife. This deprived her of conjugal rights, but at the same time kept her tide to him, indefinitely, so that she would not marry again. This was highly unfair and unjust to the woman in wedlock because she was neither liberated from the marital bond nor treated as a wife by swearing husband but was kept in a suspensory and torturous state for indefinite period[1].

Islam in the first place disapproved in perfectly general terms for not making thoughtless oaths in the name of Allah an excuse for not doing the right things when it is pointed out to us, or for refraining from doing some thing which will bring people together[2].

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1. Abdullah Yusuf Ali; *The Glorious Qur'an*; Translation with brief notes & Commentary, p. 89, 2nd ed. (1977), American Trust Publication Canada.
2. Ibid.

The Holy Qur'an says to this effect in the most categorical terms.

"And make not
Allah's name an excuse
In your oath against
Doing good or acting rightly or making peace,
Between persons, for Allah is one
Who heareth and knoweth all things"[3].

Therefore, Islam at one hand discouraged and condemned, in general, of taking thoughtless oaths but on the other hand insisted on proper solemn intentional oath being scrupulously observed. The Holy Qur'an again commands;

"Allah will not call you to account,
For thoughtless in your oaths,
But for the intention in your hearts,
And He is oft-forgiving most forbearing"[4].

Thus, in the serious matter like that affecting a wife, if the oath was put forward as an excuse, the swearing man is commanded that it is not an excuse at all. Allah looks to intention and not mere thoughtless words. The parties are, therefore, allowed a period of four months to make up their mind and see that an adjustment is possible.

Hence, by 'Ila' the marriage was not completely dissolved by

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3. Holy Qur'an; II : 224
4. Holy Qur'an II: 225;

the pagan Arabs but it meant a cessation of sexual relations between the husband and wife. The wife was thus deprived of the sexual intimacy during the swearing period but she remained tied down to her husband and could not contract another marriage. Islam has put a rational check to the evil effect of this barbarous practice. It has discouraged the use of such expression by imposing a penalty on the husband who wants to retain his wife after the use of the expression Ila. If he does not repent and cancel his declaration within prescribed period of four months, he stands to loose his wife[5].

Definition of Ila:

Ila in its primitive sense signifies a vow of abstinence from approaching the wife for a period. In law it implies a husband's swearing to abstain from carnal relation with his wife for any time above four months if she is a free woman or two months if she is a slave woman. If a man swear that he will not have sexual connection with his wife or that he will not have such connection with her within four months, an Ila is established[6].

The person making the vow is called a Mooli who is defined as a person who can not approach his wife for a period of four months without incurring some penalty or some very troublesome, serious or

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5. K.N. Ahmad; *The Muslim Law of Divorce*, p. 105, (1984) Kitab Bhawan New Delhi.
6. *The Hedaya*; Translated by Charles Hamilton, Vol. II, p. 109, (1985) Kitab Bhawan New Delhi.

difficult liability. In Muslim law, it implies a husband's swearing by God or making a declaration to abstain from sexual intercourse with his wife for a period of four months or a longer period or that he shall undergo some specified hardship by way of penalty if he intimates with the wife within the specified period of time or make some specified expiation that shall involve some hardship to him[7].

Thus, the literal meaning of the word Ila is to vow not to have sexual intercourse with one's wife. Consequently, if a person makes a vow that he shall not have intercourse with his wife for a period of one or two months but less than four months, it should be an Ila in its literal sense, but ineffective legally. Ila shall be effective legally when a person makes a vow that he shall not have sexual intercourse with his wife for a period of four months or more. It is a condition for Ila that it must in the form of a vow otherwise it shall have no legal effect[8].

Therefore, Ila is a husband's prohibition of himself from approaching his wife for four months when he is a free man, and two months when a slave, the prohibition being confirmed by a Yameen or vow, either by God, or without Him; as by repudiation, emancipation, fasting, pilgrimage, or the like. So that if the husband

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7. Ibid.
8. Dr. Tanzil-Ur-Rahman: *A Code Muslim Personal Law*, Vol. I[st], p. 498, (1978) Karachi, Pakistan.

should approach his wife during that time, he would be forsworn, and liable to expiation, when the oath is by God, whether by Himself or by any of his attributes by which it is customary to swear, or for the consequence of the condition in other cases; and the Ila would cease after approach. On the other hand, if he should not approach her during the time, she would become irrevocably repudiated by one repudiation and the oath would be at an end, if it were for four months; but if it were for ever, as by the husband's saying, "By God I will not approach thee for ever", or if he were to say, "By God I will not approach thee", without adding *for ever*, the oath would remain, except in so far that the repudiation would not be repeated without a second marriage. If however, he were to marry her a second time, the Ila would revive, and if she were not enjoyed, another repudiation would take effect after the expiration of four months from the marriage; and if he were to marry her a third time, the Ila would again return, and on the expiration of other four months another repudiation would take effect if there were no intermediate intercourse. If, subsequently to all this he should marry her after another husband has had her, repudiation would not take effect on that Ila but the vow would remain; and if he would have intercourse with her he would be liable to expiation[9].

9 Neil B.E. Baillie; *A Digest of Moohummadan Law*; p. 274, (1865), London.

Holy Qur'an and Ila:

Ila is an abstinence from the sexual intercourse from a wife for a period of not less than four months in pursuance of a vow to that effect. The pre-Islamic Arabs effected such a divorce by taking a vow of continence followed by abstinence for a certain length of time. As no definite time period was set prior to Islam, it may be presumed what determined this was the intention of the husband which could very well be to abandon his wife. The principle seems to be that the husband lost his right as non-user. The wife was, therefore, instructed to wait until the intention of the husband became apparent which sometimes extended to a long period of time leaving the wife in suspense as to whether or not she was divorced. This injustice was removed when Islam set a time limit of four months during which husband is at liberty to break his vow or resume his cohabitation with his wife[10].

The Holy Qur'an declares:

> *For those who take an oath for abstention from their wives,*
> *A waiting for four months is ordained;*
> *If then they return,*
> *God is oft-forgiving most merciful,*
> *But if their intention is firm for divorce,*
> *God heareth and knoweth all the things*[11].

10. Ibid. p. 275
11. The Holy Qur'an; II : 226

Commenting upon the aforesaid verses of the Holy Qur'an, a well-known Islamic Jurist Maulana Abul A'ala Maududi observed that although it is true that relations between husband and wife do not always remain cordial yet Allah's law does not allow that the strained relations should continue indefinitely. Therefore, it lays down the maximum period of four months for a separation in which they legally remain husband and wife but practically live separate life without any conjugal relations between them. Such a separation is called Ila in the Islamic Code of Law. During this period they must either make reconciliation between themselves or part for good so that they may be free to remarry a suitable person of their liking[12].

From the words "those who take an oath" the Jurists belonging to Hanafi and Shafi'i school of thoughts conclude that this period of four months applies to only those cases of separation which are made on oath; if they remain separate for any length of time without an oath, this law would not apply to them. On the other hand, the Jurists belonging to Maliki school of thought are of the opinion that maximum period of four months apply to all the cases of separation. A saying of Imam Ahmad bin Hanbal also supports this view[13].

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12. Syed Abul A'ala Maududi's; The Meaning of The Qur'an; Vol. I[st], p.157, (1979) Islamic Trust Publication, New Delhi.
13. Ibid, p. 158.

Hazrat Ali, Hazrat Ibn-Abbas and Hasan Basri are of the opinion that this law applies only to that case of separation which is the result of the strained relations, and does not apply to the case in which the husband and the wife agree to discontinue conjugal relation with mutual consent for some common good and at the same time keep cordial relations. There are Jurists who are of the opinion that law of Ila would apply to every case of separation made on oath irrespective of the fact whether their relation remain good or bad, hence it should not go beyond term of four months[14].

According to the verdict of Caliph Uthman, Ibn Masud, Zaid bin Thabit and some other Jurists, they can re-unite only within four months. The expiry of this term itself is a proof that husband has decided upon divorce. Hence after its expiry, divorce will automatically take place and the husband will forfeit the right of reunion. If, however, both of them agree, they may remarry. There is a verdict to the same effect from Hazrat Umar, Hazrat Ali, Ibn Abbas and the Jurists of the Hanafi schools have accepted it[15].

Ahadith and Ila:

The principles of Ila under the Muslim law is founded on the following Ahadith:

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14. Ibid.
15. Ibid.

It was narrated by Anas bin Malik that Allah's Messenger took an oath that he would abstain from his wife, and at that time his legs had been sprained (dislocated). So he stayed in the Mashruba (Anattic room) for twenty-nine days. Then he came down and the people said "O Allah's Apostle you took an oath to abstain from your wives for one month". He said, the month is of twenty-nine days[16].

Another tradition by Nafi is that "Ibn Umar used to say about Ila which Allah defined in the Holy Book, "if the period of Ila expires, then the husband has either to retain his wife in a handsome manner or to divorce her as Allah has ordered". Ibn Umar added that when the period of four months has expired, the husband should be put in prison so that he should divorce his wife, but the divorce does not occur, unless the husband himself declares it. This has been mentioned by Hazrat Uthman, Hazrat Ali, Aisha and twelve other companions of the Prophet (PBUH)[17].

Hazrat Ali bin Abu Talib used to say; when a man vows not to cohabit with his wife, the women will not be divorced, even if four months should pass, until the case is taken to a Judge and husband be compelled either to give divorce or cohabit[18].

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16. *Sahih Al-Bukhari*; Translated by Dr. Muhammad Muhsin Khan Vol. VII, p. 160, (1984) Kitab Bhawan, New Delhi.
17. Ibid.
18. *Muwatta Imam Malik*; Translated with exhaustive notes by Prof. Mohammad Rahimuddin; p. 248, Ist ed. (1981) Kitab Bhawan New Delhi.

Hazrat Abdullah bin Umar used to say; "when a man pronounced Ila upon his wife and four months elapse, the husband should be brought before a Judge and compelled either to divorce or take her back. The lapse of four months without divorce will not bring the divorce into effect"[19].

Shihab reported that Sa'id bin Al Musayyab and Abu Bakar bin Abdul Rehman used to say; "the man who pronounces Ila against his wife and after four months one divorce would become effective, but the husband has the option to take the wife back during Iddat probation[20].

It reached Malik that Marwan bin Hakam was asked to give decision about a man who pronounce Ila against his wife. He said, after the lapse of four months, one divorce become effective but husband has option to take her back during Iddat[21].

Therefore, divorce by Ila is a temporary separation from the wife and is duly mentioned in the Holy Qur'an and supported by the authentic traditions of the Holy Prophet (PBUH).

In literal sense it signifies a vow, but in Islamic Shariah this means angrily abstaining from sexual connection with one's wife for

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19. Ibid.
20. Ibid. p. 249.
21. Ibid.

four months. If a man swears that he will not have any sexual connection with her within four months, an Ila is established.

Person Competent to Pronounce Ila:

According to Imam Abu Hanifa the persons competent to pronounce an Ila are those who are competent to repudiate the marriage, i.e., he should be adult and sane. However, according to the two disciples of Imam Abu Hanifa, the persons competent to pronounce Ila are those who can make a vow. But they were all of opinion that no person can be Mooli except by an oath against natural intercourse and if he is forsworn by other than an oath of that description he is not a Mooli[22].

The woman in respect of whom an Ila vow can be made should be the wife of the person making the vow at the time when Ila is to take effect. But an Ila can be made in respect of a woman not yet the wife of the speaker provided it is to take effect in future at the time when the marriage has actually taken place and she becomes his wife. Thus, a man may say to a woman, "By God, I shall have no sexual intercourse with you when I marry you", then Ila shall be effected if he marries her because his vow makes Ila applicable when the woman acquire the status of being his wife. But if Ila is made in

22. Supra note 5. p. 107.

respect of a woman other than the wife without reference to her status at the time when Ila is to take effect then Ila shall be ineffective. Thus, if a person says to a woman who is not his wife, "By God I will never have sexual intercourse with you", and he afterwards marries her then Ila shall not be established. Here there is no reference to her status at the time when Ila is to take effect[23].

Mode of Expressing Ila:

The words by which Ila is effected may be either sureeh (express) or kinayah (implicative). The sureeh or express is such word which first present to the mind the idea of sexual intercourse. It would be an express term if one were to say, "I swear by God that I will not approach thee or by some other words by which an oath may be effected to a woman who is not in her menses because in case of a woman, during her menses, the abstinence is due to pollution rather than to the vow. As if one were to say, "I swear by God that I will not cohabit with thee", "I will not have carnal connection with thee". All these would amount to an express Ila[24].

The Kinaya or implicative are the words that do not directly present to the mind the idea of coition and are susceptible of an other meaning so long as Ila is not intended by them. The implicative

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23. Ibid.
24. *The Durr-ul-Mukhtar*; Translated by B.M. Dayal; p. 234 (1992) Kitab Bhawan New Delhi.

expression of Ila are, "I will not touch thee", or "I will not approach thy bed". I will not enter upon thee. It would be eternal Ila if one were to say, for, instance, "I would not approach thee till the coming out of the earthly beast", or till the coming out Dajjal or till the day the sun rise from the west[25].

Therefore, a Ila may be contracted by all expression by which a vow may be contracted. As if he were to say, "By God or by the Majesty or greatness of God". It can not be contracted by any words which are not sufficient to effect a vow; as if he were to say, "By Knowledge of God, I will not approach thee or the wrath of God be upon him and the like. All the Sunni Jurists hold that invoking the name of God or one of His attributes where by the husband makes it unlawful for himself to be intimate with his wife is necessary to constitute Ila. But there is a difference of opinion whether a vow of other classes where by the husband abstains from intimacy will constitute an Ila. The correct view is that whatsoever be the vow by which intimacy is to make unlawful an Ila shall be effected provided the vow incurs some hardship. The above opinion has been expressed by Abu Hanifa, Imam Malik Shafi'i etc[26].

25. Ibid. p. 235.
26. Ibid.

It is a necessary condition of Ila that there should be no uncertainty or vagueness in the expression used. The expression nay be conditional or unconditional. But a vow depending on a condition which is uncertain or which may be or may not happen within four months does not constitute Ila. Thus, the expression, "By God I will have no sexual intercourse with you till such a person arrives or such a thing happens when it is possible for the person to come within four months or for the thing to happens within that period of time, does not amount to an Ila[27].

A husband can take a vow that he will not be intimated with his wife and that on breach of the vow he shall be liable to particular penalty some great hardship and in such a case, i.e., if he commits a breach of his vow he shall incur only the particular penalty specified by his, if the penalty involved is light and something of everyday practice then there shall be no Ila. Thus if he says, "By God, I shall not be intimated with you for four months, I commit a breach of my vow then it shall be incumbent on me to read the Holy Qur'an or to offer prayers", etc. then no Ila shall be constituted. But if he says that he will recite the Holy Qur'an one hundred times or to offer prayers hundred times then Ila shall be constituted because these acts do involve hardships. Similarly, if he swear by God that he will have

27. Supra note 5, p. 109.

no sexual connection with his wife for a period of four months and that if he should commit a breach of the vow within that time then he shall perform a Hajj or fast for a specified time, etc. then on a breach of the vow he shall have to perform the particular penalty specified by his, as for example, the performance of the Hajj or fasting for the specified for the number of days or whatever other penalty he had declared in his vow[28].

In *Bibi Rehana Khatoon v/s Iqtedar-Uddin Hussain*[29] it was held that a declaration by the husband that his wife would be a wife in name only was not to amount to an Ila vow. This can be based on due fact that here the husband had merely made a statement and had not taken a vow and does not undertake any penalty on being guilty of its breach.

Period of Ila:

The minimum period of vow for Ila must be for four months or for a longer period or for an indefinite time and thus for maximum period no time limit has been prescribed. But if it relates to a period less than four months then the vow does not constitute Ila. This is so even though the accumulated period of two or more consecutive Ila vows may amount to four months or a long period of time. Thus, if a

28. Ibid. p. 110.
29. AIR. 1943, All. 84.

man makes a vow, saying to his wife, "By God I will not have sexual connection with you for two months, nor for two months after that, Ila is established". But if a man swears that he will not have sexual connection with his wife for two months", and then remains silent for a day, and next day again swears that he will not have carnal connection with her for two months after the other two months, Ila is not established because the second vow is distinct and separate from the former[30].

A husband shall not be held to have pronounced Ila except when he takes an oath against having sexual intercourse with his wife. If the husband's oath refers to something else than sexual intercourse then he shall not be held to have made Ila. Thus if a man says to his wife. "By God, my skin shall not touch thy skin, he shall not be deemed to have made an Ila because the vow refers to a breach of something other than sexual intercourse and touching their skin is possible without there being intimacy between them. It is also a necessary condition of Ila that it should not be possible for the husband to violate the vow, that is, to have sexual intercourse with his wife without being guilty of the breach of his vow. Thus, if a husband being in Karachi and his wife being in Delhi swears that he will not go to Delhi then Ila is not established because there is no

30. Supra note 5, p. 108.

reference to intimacy while he can still be intimate with his wife without incurring any penalty as by sending for her at Karachi and being intimate with her there[31].

Effect of Ila:

If the vow is kept, i.e., if the husband abstain from sexual intimacy with his wife or does not cancel the Ila within four months, then under the Hanafi Law, there shall be effected an automatic divorce on the expiry of that period. If he is intimate with his wife during the period of four months, then he is forsworn in his vow[32].

However, according to Imam Malik, Imam Shafi'i and Ahmad bin Hanabal, there can be no automatic divorce, but the matter shall remain suspended till the husband either revokes his Ila or divorce his wife. If he does neither then wife can have recourse to Qazi[33].

According to Hanafi law, in case of Ila divorce gets effected without intervention of a Qazi. Only the passing away of the prescribed period is the condition. But according to Malik law, the Qazi shall ask the husband to resume his sexual connection with his wife or to divorce her. If the husband refuses or fails to comply with the Qazi's order, the Qazi shall himself dissolve the marriage. Imam

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31. Ibid.
32. Ibid.
33. Ibid.

Shafi'i and Ahmad bin Hanbal expressed the same view as that of Imam Malik[34].

The difference between the Hanafi and other Sunni schools arises due to difference in interpretation of Qur'anic verse II: 227 of Surah al-Baqrah about Ila.

The Hanafi School argues that husband's not breaking vow for four months is a proof of his firm intention to divorce the wife. They also assert that Ila was a form of divorce in Pre-Islamic days and Shariah has only placed conditions and limitations on it without changing its nature and effect. The other reason in support of this view is that Ila is a wrong caused to the wife by husband who denies her right of marital life and as such he is punished by dissolution of marriage[35].

The opposite view, on the other hand, is justified on the plain reading of the verse, referred to above, which speaks of formation of intention of divorce after the expiry of Vow and not divorce itself. The other reason in support of this view is that Ila is a wrong caused to the wife by the husband who denies her the right of marital life and as such he is punished by the dissolution of marriage at her instance[36].

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34. Supra note 8, p. 499.
35. Ibid. p 500.
36. Ibid.

Nature of Divorce by Ila:

Under the Hanafi law, the divorce that is effected by Ila amounts to an irrevocable divorce. But according to Imam Malik, and Ahmad bin Hanabal it would amount only to a Rajai or revocable divorce. Such divorce declared by Qazi shall also amount to one revocable divorce. According to Ahmad bin Hanbal, as certain report say, it would amount to an irrevocable divorce[37].

Under the shia law, the husband who vow an Ila should be major, sane and should posses understanding and have free will and intention to effect Ila. The woman should be his lawfully married wife. There can be no Ila in respect of a women married in Muta. According to shia jurists, the Ila should for a period exceeding four months. The Ila cannot be conditional. It cannot be cancelled by words. It can only be cancelled by cohabitation. However, if the husband is temporarily unfit for cohabitation, he can do so by speech, declaring that he will cancel the Ila by cohabitation when he is able to do so. According to shia jurists, a divorce is not effected by the mere expiry of the time of four months. The wife shall have to make a petition to the Judge[38].

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37. Ibid.
38. Jafar bin-Al Hasan; *Kitab Shariah al-Islam*; p. 228, (1937) Tehran.

The Judge, however, cannot dissolve the marriage but shall order the husband either to take back his wife or to divorce her. On the husband's failure or refusal to do so the Judge can imprison and punish him to force him to choose one of the above two alternatives. The separation effected by a divorce given on an Ila shall amount to a rajai (revocable) divorce, unless the husband gives a bain (irrevocable) divorce[39].

The Shia Law wants the continuation of marriage and to discourage its termination as far as possible. Hence, if the husband alleges that he has cancelled the Ila by being intimate with the wife during the period of four months or says that period of four months has not expired but wife denies such an allegation then husband's version would be accepted in preference to her denial so that marriage may not be dissolved[40].

Expiation:

If the husband has intercourse during the period of Ila, it amounts to the violation of his vow. He should, therefore, make the expiation for the breach of his vow. It consists of manumission of a slave, or clothing or feeding ten poor persons. If he has no ability to do either of them, he should fast for three days consecutively. The

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39. Ibid.
40. Ibid.

rule of expiation is based on dictates of the Holy Qur'an as contained in the following verse of Surah Al-Maidah:

"God will not call you
To accept for what is
Futile in your oaths,
But He will call you
To account for your deliberate,
Oaths; for expiation, feed
Ten indigent persons,
On the scale of average
For food of your families,
Or cloth them; or give
A slave his freedom
If that is beyond your means,
Fast for three days; That is expiation[41].

The commandment about oath has been laid down here in connection with instruction about food, because some people had taken oaths for making some lawful things unlawful for themselves. The commandment is that if one uttered a word of oath without any intention behind it one shall not be bound to observe it, for, there is no punishment for this. But if one has deliberately taken such an oath one must break it and expiate for the violation because one must abrogate such a sinful oath[42].

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41. *Holy Qur'an*; V: 92.
42. Supra Note, 12 p. 74.

Concluding Remarks:

From the above discussion it may safely be concluded that Ila is a temporary separation from the wife, but in Islamic Shariah this means angrily abstaining from sexual connection with one's wife for four months. If a man swears that he will not have any sexual connection with his wife or that he will not have any such connection with her within four months, an Ila is established.

It was a practice of pre-Islamic days by which the wife was kept in a state of suspense, sometimes for whole of her life. In pre-Islamic days the Arabs used to take such oaths frequently and as the period of suspension was not limited, the wife had sometimes to pass her whole life in bondage, having neither the position of a wife nor that of a divorced woman free to remarry elsewhere. Islam reformed this state of affairs by commanding that if the husband did not assert the conjugal relations within four months, the wife should be divorced[43].

If any one swears or says to his wife that by Allah he will not have sexual intercourse or by Allah he will never do sexual intercourse with her or something else in this respect, then its order is that if he actually did not have sexual intercourse then at the end

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43- Mohammad Iqbal Siddiqui: *The Family Laws of Islam*; p.238, (1988), International Islamic Publishers, New Delhi.

of four months it will have the effect of divorce and now they cannot live as husband and wife without remarriage. But if before the expiry of four months, he breaks his oath and did sexual intercourse, then there will be no divorce but he shall have to give recompensation for breach of oath[44].

If the husband, thus, decides to keep away from the wife without divorcing her and translate his decision into action, the shariah law does not keep the wife for rest of her life at the mercy of her husband recognising this action of the husband (called Ila) as a kind of desertion, it permits him to prolong it only upto four months within which time he must resume cohabitation and if he has taken a vow not to cohabit and has committed the breach of his vow before the expiry of four months, he must make expiation before resumption of cohabitation. If the husband does not resume cohabitation till the expiry of four months, the law enables the wife to become free from the marital bond[45].

A Shafi'i or Ithna Ashari woman whose husband has deserted her by Ila may submit a suit for the dissolution of her marriage under section 2 clause (ix) of the Dissolution of Muslim Marriage Act 1939. However, without a decree of faskh, her marriage will not be dissolved. If the woman is a Hanafi, her marriage will be dissolved

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44 Ibid.

45. Tahir Mahmood; *The Muslim Law of India*, p.106, II[nd] ed. (1982) Law Book Co. Allahabad.

automatically by a talaq which the husband cannot revoke. If the husband still compels her to live with him, she can submit a suit for a decree under section 2(ix) of the Act of 1939 for confirmation of dissolution of her marriage[46].

From the above discussion, the result which comes out is that divorce by Ila again is aimed to protect in long terms the interest of the wife against a particular kind of desertion by the husband. The law of Ila is wrongly included by the authors of Muslim Law among the forms of divorce by the husband. It is infact a principle of Islamic matrimonial law which protects the wife against a desertion by the husband. According to section 2(ix) of the Dissolution of Muslim Marriage Act, 1939, she has a right to go to court for the dissolution of marriage against her husband.

46. Ibid.

CHAPTER – VII

DIVORCE BY ZIHAR: EFFECTS AND EXPIATION

The pre-Islamic Arabs had devised a system of separation known as zihar whereby a wife was deprived of sexual intimacy with the husband yet she remained a wife. The means employed for such a separation was that the husband compared his wife to the back of his mother. This was known as 'zihar' where the marriage subsisted, the woman still remaining the wife of the person, but deprived of all sexual intimacy[1].

It is not quite clear whether the comparisons in such cases were regarded by the ancient Arabs as 'Assimilation injurious', or as promoting the woman from the status of a wife to the position of an adoptive mother. It is probable that each view was held but at the different historic periods. Whatever may have been its original significance, there is no doubt that at the time of Holy Prophet Mohammed (PBUH), this mode of divorce had become so frequent and had assumed so mischievous character that it tended to degrade the morality of the Arab tribes beyond any other custom[2].

Islam freed the wife from this infamous practice discouraging the use of such expressions. In clarified a wife's position stating that she does not become the mother or any other relation by mere idle statements. It further imposed a penalty on the husband who expressed zihar but wishes

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1. Dr. Zeenat Shaukat Ali; Marriage and Divorce in Islam: An Appraisal; P. 222, (1987) Jaico Publishing House, Bombay.
2. Ibid.

to retain his wife. The wife was further empowered to force the husband either to divorce her or re-establish the matrimonial connection on adhering to the prescribed penalty[3].

Thus in pre-Islamic Arabia, Zihar was considered to be a sort of divorce. Muslim Law, however, while preserving its nature which is prohibition from intimacy with the wife, has altered its effect to a temporary prohibition which does not dissolve the marriage. Hence, Zihar does not exactly amount to a divorce and is distinct from it.

Meaning and definition of Zihar:

The word Zihar is derived from the word "Zahr" which means "back" of man, animal or thing. In the language of law, it signifies a man comparing his wife to any of his female relation, within such prohibited degree of kindred, whether by blood, by fosterage, or by marriage, as renders marriage with them invariably unlawful. If the husband compares his wife to a woman permanently forbidden to him, such as mother, sister or aunts, it is called Zihar. Likewise, his comparing any part of the body of his wife with any part of the body of a woman who is permanently forbidden to him, is included within the definition of Zihar, provided that part of the body mentioned be such by which the entire body may validly be understood[4].

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3. Ibid.
4. *The Hedaya*: Translated by Charles Hamilton; Vol. 2nd , p.117, (1985) Kitab Bhawan, New Delhi.

If a man says to his wife, "you are to me like the belly of my mother, or, "the thigh, or, "the pudendum" Zihar is thereby established, as Zihar signifies the likening of a woman to a kin woman within the prohibited degrees which interpretation is found in the comparison being applied to any of the parts or members improper to be seen. Zihar is in the same manner established by the likening of the wife to the any other kin woman within such prohibited degree as that marriage with them is at all times unlawful, such as, sisters, and aunts as well, foster mothers, who are invariably prohibited, as well as, natural mother. And so also if a man says to his wife, your head is to me like the back of my mother, because by these the whole person is figuratively expressed. And so also if he were to say, your half or your third because in this case the effect is established in a diffusive portion and consequently extends to the whole person[5].

However, where a person says to his wife, "you are to me like my mother". In such case it is requisite that his intention be examined into so as to discover true predicament in which the wife stands; and if he declares that his meaning was only to show respect to his wife, it is to be received according to his explanation, because in speech respect may be expressed by a general comparison : or if he declares his intention, to have been Zihar, that is accordingly established for, here appears a comparison with the

5. Ibid.

whole person of his mother in which her back is included but as that is not expressly mentioned, the speaker's intention is requisite to establish it. And if he declares his intention to be divorced, a divorce irreversible takes place, as his comparing his wife with his mother is likening her to one who is prohibited to him, and is therefore same as if he were to say; you are *prohibited to me, thereby intending divorce; but if he declares that he had* no positive intention neither Zihar nor divorce is established[6].

According to Imam Abu Hanifa and his two disciples Imam Abu Yusuf and Muhammad if the husband intends to render the wife unlawful to him by saying to her, "*Thou art to me like the back of my mother*", then expression will amount to divorce. But if he says to his wife; "Thou art my mother without saying, "to me" intends nothing in particular then according to Imam Abu Hanifa and his disciples, the effect is nil and there is no Zihar[7].

Thus, zihar is a form of imprecation which involves separation of the husband and wife until expiation is made.

Religious basis of Zihar:

The law about the zihar is based on the injunctions of the Holy Qur'an given as below:

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6. *The Durr-UL-Mukhtar*: English Translation by B.M. Dayal: p. 26 (1992) Kitab Bhawan, New Delhi.
7. Ibid.

"Allah has not made
For any man two hearts
In his (one) body: nor has
He made your wives whom
Ye divorce by Zihar nor has
He made your wives whom
Ye divorce by Zihar
Your mother; nor has He
Made adopted sons
Your sons, such is (only)
Your (manner of speech)
By your mouths. But
God tells you the truth and He
Shows the (right) way"[8]

Regarding the zihar God at another place in the Holy Qur'an commands:

"God has indeed
had accepted the statement
of the woman who pleads
With the concerning her husband
And carries her complaint
(In prayer) to God;
And God always hears
The argument between both
Sides among you: For God
If my men among you
Divorce their wives by zihar

8. The Holy Qur'an; XXXIII: 4.

(Calling them mothers)
They cannot be their mothers
None can be their mothers
Except those who gave them birth
And Infact they use words (both) iniquitious,
And false but truly
God is one that blots out sins
And forgives again and again:[9]

Again the Holy Qur'an says:

"But those who divorce their wives by Zihar
then wish to go back on the words they uttered
It is ordained that such one should free a
Slave before they touch each other;
To this are ye admonished
To perform, and God is well acquainted with all that
ye do."[10]

The Holy Qur'an further says to this effect;

"And if any has not the means
He should fast for two months consecutively
Before they touch each other.
But if any is unable to do so,
He should feed sixty indigent persons
That is in order ye may show
your faith in God."[11]

The occasion for the revelation of the instant verses is reported by Hazrat Ayesha that Khawlah Bint Thalabah presenting herself before the

9. The Holy Qur'an; L VIII: 2.
10. The Holy Qur'an; L VIII: 3.
11. The Holy Qur'an; L VIII: 4.

Holy Prophet (PBUH) complained that she passed the prime of her life in the company of her husband but now that she had grown old, he had committed Zihar to her. Hence, she laid her complaint before God. It is said that by Hazrat Ayesha that Khawlah had yet not moved away when the said verses were revealed[12]. The fact is that during Jahiliyah the evil custom of zihar was practiced by the Arabs by which they used to selfishly deprive his wife of her conjugal rights and kept her tied to himself like slave without his being free to remarry. He pronounced the word importing that she was like her mother. After that she could never demand conjugal rights but at the same time she was also not free from his control and could not contract another marriage. The Holy Qur'an had condemned it in the strongest possible terms and punishment is provided for it. A man sometimes says such words in a fit of anger. They did not affect him but they degraded the position of a wife[13].

However, in Pagan Arabs Zihar as a custom in the form of divorce was very much prevalent as it happened to Khawlah bint Thalabah. After using the word that "*thou art to me as the back of my mother*", the husband freed from any responsibility for conjugal duties. It means husband is not bound to support her and her children. In the case of Khawlah, the woman was having children who were too young and she was not having any

12. Abdullah Yusuf Ali; *The Glorious Qur'an*: Translation and Commentary, p.1103, 2nd ed. (1977) American Trust Publication, Canada
13. Ibid.

resources to support herself and her children. She pleaded before the Holy Prophet (PBUH), her just plea was accepted and this inquitous custom based on false word was abolished. Because, He is a just God and will not allow human customs or pretences to trample on the just rights of the weakest of His creature. Such words are false in fact and inquitous, in as much as they are unfair to the wife and unseemly in a decent society. He prescribed in the next verse because He wishes to blot out what is wrong and gives as a chance to reform by his forgiveness[14].

Commenting upon the verses referred herein before, Islamic jurist Maulana Syed Abul A'ala Maududi lays down that indeed Allah has heard the saying of the woman who was pleading with the Holy Prophet (PBUH) about her husband and was making her complaint to Allah. Allah was hearing your mutual conversation and hears and sees all the things. Those of you who put away their wives by zihar should know that their wives are not their mothers. Their mothers are only those women who gave birth. They utter a monstous and lie and infact Allah is all pardoning and all forgiving. Those who pronounce zihar with regard to their wives then go back on what they had said shall have to free a slave before touching each other. This you are advised to do and Allah is well aware of whatever you do. And the one who does not have means to free a slave should fast two

14. Ibid.

consecutive months before they touch each other. But if anyone is unable to do so, he should feed sixty indigent persons[15].

No doubt, the principles of institution of zihar has been in detail explained in Sura LVIII: 1 to 5 of the Holy Qur'an and for the further clarification, it becomes necessary to go through the authentic Ahadith reported from the Holy Prophet (PBUH) on different occasions.

"Salamah b. Sakhr al-Bayadi said: I was a man who was more given than others to sexual intercourse with woman. When the month of Ramadhan (fasting month) came, I feared lest I should have intercourse with my wife and this evil should remain with me till the morning. So I made my wife like my mother's back to me till the end of Ramdhan. But one night when she was waiting upon me, something of her disclosed. Suddenly I jumped upon her. When the morning came I went to my people and informed them about this matter. I said; Go along with me to the Apostle of Allah (PBUH). They said: No by Allah. So I went to the Prophet (PBUH) and informed him of the matter. He said; Have you really committed it, Salamah? I said; I committed it twice, Apostle of Allah. I am content with the commandment of Allah; so take decision about me what Allah has shown you. He said; free a slave, I said; By Him who sent you with truth, I don't possess a neck other than this and I struck the surface of

15. Syed. Abul A'Ala Maududi; *The Holy Qur'an.* Translation and brief notes with text; p. 557, 2nd ed. (1987) Lahore.

my neck he said; then fast to consecutive months. I said; whatever I suffered was due to the fasting. He said; then feed sixty people with a wasq of dates. I said; by Him who sent you with the truth. We passed the night hungry. There was no food with us. He said; then go to the collector of sadqah of Banu Zuraiq. He must give it to you. Then feed sixty indigent people with a wasq of dates and you and your family eat remaining dates. Then I cam back to my people and said to them. I found with you poverty and bad opinion and I found with Prophet (PBUH) prosperity and good opinion. He has commended me to give alms to you[16].

Another tradition relating to zihar is that Khuwaila daughter of Malik bin Thalabah said; My husband Awsbin Samit pronounced the words; you are like my mother. So I came to the Apostle of Allah (may peace upon him) complaining to him against my husband. The Apostle of Allah (PBUH) disputed with me and said; keep duty to Allah; your husband is your cousin. I continued complaining until the Qur'anic verses came down; Allah hath heard the saying of her that disputed with thee concerning her husband. He then said; he should set free a slave. She said; he can not afford. He said; he should fast for two consecutive months. She said; Apostle of Allah; he is an old man, he cannot keep fasts. He said; he should feed sixty poor people. He said; he is not having anything which he may

16. *Sunan Abu Dawud*; English Translation with explanatory noted by Prof. Ahmad Hasan; vol. II, p. 597, (1985) Al Madina Publication, New Delhi.

give in Alms. At the moment of araq (i.e. a date basket holding fifteen or sixteen) was brought to him. I said; I shall help him with another date basket (araq). He said you have done well. Go and feed sixty poor people on his behalf and return to your cousin[17].

Narrating another tradition relating to zihar Ikrimah said; 'A man made his wife like the back of his mother, he then had intercourse with her before he atoned for it. He came to the Prophet (PBUH) and informed him of this matter. He asked him what moved you to the action which you have committed? He replied; I saw the whiteness of her shins in the moonlight. He said keep away from her until you expiate for your deed[18].

Reporting another tradition regarding the impact of zihar Sayeed bin Amar Al Zuraiqi asked Qasim bin Muhammad. If a man says to a woman, if I marry you, divorce be to you, what would happen? Qasim bin Muhammad narrated that a man had spoken thus regarding a woman in the time of Hazrat Umar bin Al-Khattab and said; If I marry her, she shall be me like the back of my mother. Hazrat Umar bin Al-Khattab ordered that if he marries her, he shall not cohabit with her until he pays the penalty of Zihar.

"It reached Malik that a man asked Qasim bin Muhammad and Sulaiman bin Yasar; what would ensue if a man should speak words of zihar to a woman prior to marriage? Both of them said; if that man should

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17. Ibid; p. 598.
18. *Muwatta* Imam Malik: Translation with exhaustive notes by Prof. Rahimuddin; P. 294, 1st. ed. (1981) Kitab Bhawan, New Delhi,

marry her, he should not cohabit with her until he paid the penalty of Zihar[19].

The brief survey of the above quoted Qur'anic injunction as well as Ahadith lead to the conclusion that mere commission of Zihar by calling her "*thou art me as the back of my mother*", does not dissolve the marriage and the woman remains the wife of the person but sexual intimacy between couple become unlawful. It did not amount to divorce but only sexual intercourse was held to be forbidden till expiation for it was made for which no period was fixed. The marriage contract did, however, subsist. The above referred Qur'anic injunctions and Ahadith also make it clear that a wife does not become mother or his kins woman of prohibited degree by the idle and foolish talk of her husband and if he addresses her as his mother or sister and then wish to go back on the words he uttered, he is commanded to perform expiation prescribed for zihar before touching each other.

Expression of Language constituting Zihar:

There is no fixed formula for zihar and any expression can be used for the purpose. But the language should be clear, unambiguous and certain. There should be no uncertainty to the zihar and an uncertain expression of the zihar is invalid. Thus, if the husband says to his wife, 'God willing you are to me', then no zihar will be established. Zihar can be given orally or in

19. Ibid.

writing and even by signs by a dumb person if they are well understood and devote his intention in this respect.[20]

In many cases an expression can amount to a divorce by the implication as well as to zihar. It becomes necessary in such a case to find the effect of the expression. According to the Muslim Jurists, such an expression takes effect according to the husband's intention as explained by him. Thus, if he were to say, "*you are to me like my mother*", it is necessary to ascertain his intention. The expression may he used merely to show respect or appreciation or to denote a divorce or a zihar or without any definite intention at all. In the first and the last cases the expression would neither establish a zihar nor a divorce. But in the second and third case, a zihar or divorce would be established according to the intention of the speaker. Hence, if he declares that he had no particular intention, zihar will not be established. But if he intended divorce, the divorce will be established.[21]

When the expression used consists of a comparison of the wife to a part of the body of his mother or other prohibited woman as when he says, "You are me like the back of my mother", zihar only will be established because the expression is used only for zihar and it can not be used for

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20. Suprs note 6, p. 260.
21. Ibid.

divorce and so, no divorce would be effected by such an expression even when such be the intention of the husband.[22]

Therefore, the pillar of zihar is a husband's saying, "*thou art to me like the back of my mother*", or the expression of the like effect. When a man has said, "*thy head is to me*", "*or thy face*", "*or thy neck*", "*or thy nakedness*", he becomes "a Muzahir"[23]. So also when he has said, "thy body is to me like the back of my mother," or the fourth or half of three", or any other undivided portion. But if the part mentioned be one that does not imply the whole person, such as the hand or foot, zihar is not established if he should say "*thy back is to me like the back of mother*", or her belly", or her nakedness," it would not be a zihar. But if the person herself is likened to any member of his mother that it is unlawful for him to look on, it is the same as the likening to her back. So, also, if likening be to any other woman among those who are permanently prohibited to him, as his sister or aunt or foster sister. When the likening is to what may be lawfully seen as the hair, the face, the head, the hand the foot, it is not a zihar. Therefore, in order to constitute zihar the expression used must consists of comparison of the wife to a part of the body of his mother or other prohibited woman[24].

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22. Ibid., p. 261.
23. The term Muzahir means the comparer, "or husband who makes zihar.
24. Neil B.E. Baille; *Digest of Moohammudan Law*; p. 322, (1865), Smith Elder Co., London.

Therefore, comparison is a necessary condition to constitute zihar, and so there will be no zihar if there is no comparison as when a husband calls his wife as his daughter, mother etc.; without comparison the expression may amount to a divorce if he so intends but can not amount to zihar. Further, the comparison should not be to a woman permanently prohibited to him. If the wife be compared to a woman, only temporarily prohibited, there is no zihar. Thus, a comparison to one's sister-in-law will not amount to zihar as marriage with her is possible on the dissolution of the present marriage by divorce or on wife's death. When the comparison relates to a part of the body of a woman, that part must be such as is not proper for him to see. Hence, when the comparison is to what can be seen in decency by him as the face, hands, hair, etc., there is no zihar[25].

Under the present law, however, mare statement of the husband will not suffice and the court will give its finding on the evidence produced before it and will be guided by the circumstances of the particular case.

Capacity for Zihar:

It is a condition of zihar that the husband be a person capable of making expiation, i.e., he must be a sane and adult. Hence, the zihar of a minor or insane person is not valid. Further, the husband should not be in a faint or under the influence of sleep. Zihar by any one in one of these conditions is not valid. But it is not necessary under the Hanafi law that the

25. Ibid. p. 323.

husband should be in earnest so that zihar by one in jest or mistake is valid. Zihar under compulsion is valid and effective according to the Hanafi school of thought but Imam Shafai and Ahmad Ibn Hanbal do not agree with this view and according to them zihar under compulsion is invalid. Zihar by a dumb person is valid when he made in writing or by intelligible signs and with intention. Zihar by drunken man is valid according to the Hanafi law[26].

The husband is competent to make zihar only in respect of his lawfully married wife. Hence, if a person says to a woman who is not his wife, "*you are to me like the back of my mother*" and afterwards marries her, Zihar shall not be established because the woman was not his wife when he used the expression of zihar. But if says to a woman, "*if I marry then you are to me as the back of my mother*" and afterwards marries her, then zihar shall be established and expiation shall become incumbent on him[27].

Zihar is valid to an infant wife or one under physical obstruction, or in her monthly course, or under purification after childbirth, or one who is insane or unenjoyed. If a man gives his wife revocable repudiation, and then a zihar while she is in her iddat, the zihar is valid. But not so if given to a wife thrice or irrevocably repudiated or to one under Khula even

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26. Supra note 24, p. 325.
27. Ibid.

though iddat was unexpired. However, it is not open to the wife to use the expression of zihar against her husband.

A wife against whom zihar has been made is entitled to call her Muzahir (i.e. one who has expressed a zihar) husband to return to his matrimonial duties. She can also prevent him from intimacy with her till he has made necessary expiation. If he does not make it, then according to Muslim law, the Qadi on her complaint is to imprison and punish him till he does so or repudiate her. The Qadi can also order the beating of the husband in such a case[28].

Islam has thus forbidden to keep a wife in suspense by giving up intimacy with her and at the same time not divorcing her. There is a clear Qur'anic injunction in this regard:

> *"But turn not away (from a woman) altogether so as to leave her (as it were) hanging (in the air) i.e. in the suspense"*[29].

If the husband declares that he has performed the expiation, his declaration is deemed sufficient and the Qadi is not required to inquire if the allegation is true or not and the husband's version will be accepted as correct until it is proved to be incorrect.

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28. K.N. Ahmad; *The Muslim Law of Divorce*; p. 121, (1984), kitab Bhawan, New Delhi.
29. *The Holy Qur'an*; IV: 129.

Duration of Zihar:

Zihar can be limited in point of time. Thus, where a husband says to his wife, "*you are to me like my mother's back for one year*", zihar will be effective for the period of one year only and will become ineffective after that period and he can renew his sexual relations with her on the expiry of the period without incurring expiation. But according to Maliki Law, an expression of zihar limited in time shall amount to an absolute zihar and shall not become ineffective with the expiry of the specified time. Expiation would, however, be incumbent on him if he is intimate with the wife before the expiry of the period. Imam Shafai and Imam Ahmad Ibn Hanbal also agree with view of Imam Abu Hanifa[30].

Therefore, when a man has said to his wife, "thou art to me like the back of my mother, tomorrow", or after tomorrow, it is but one zihar but if he were to say; thou art to me like the back of my mother tomorrow and when after tomorrow has come, there would be two zihars and if, he makes expiation today, it would not suffice for zihar which would take effect after tomorrow. If he were to say, "thou art to me like the back of my mother every day, there would be only one Zihar which would be cancelled by one repudiation. But if he were to say, "thou art me like the back of my mother in every day", the zihar would be renewed each day and when one day had

30. Supra note 28, p. 122.

passed, the zihar of that day would be void but he would become Muzahir by a new zihar for the next day. He might however, have intercourse with her in the night and if he makes expiation in the day, the zihar of that day would be void, but it would return on tomorrow[31].

Legal Effect of Zihar:

The legal effect of zihar is that though the marriage contract shall remain intact but having sexual intercourse or any other like solicitation with the wife shall be forbidden as long as the husband does not expiate the transgression. Hence, if the husband tells his wife that "*she is to me like the back of my mother*", the wife becomes forbidden to him and his carnal connection with her becomes unlawful as well as every conjugal familiarity, such as, kissing and endearment with the wife becomes forbidden until he performs expiation for the zihar according to the rules enjoined in sacred Holy verses of the divine Book Qur'an[32].

However, if the husband has sexual intercourse with the wife before performing expiation, pardon must be asked of the God but no other penalty is incurred than the first expiation and the husband should refrain from her till expiation is performed. Though after the zihar, if the husband repudiates the marriage irrevocably and then marry her again, the sexual

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31. Supra note 24, p. 325.
32. Dr. Tanzil-ur Rahman; *A code of Muslim Personal Law*, Vol. 1st , p. 502, (1978), Karachi-Pakistan.

intercourse of any other kind of enjoyment with her would be still unlawful till expiation is performed by the husband. Similarly, if the wife is a slave and her husband commits zihar against her, and then purchases her, so as to cancel the marriage by virtue of her becoming his property or if being free, she apostatises from the Islam, joins herself to the Dar-ul-Hurb or a foreign country; be captured and then purchased by her husband; or if after zihar he himself apostatizes from the faith of Islam or if he repudiates his wife three times and she was then married to another husband and then subsequently returns to the first, in none of these cases would sexual intercourse be lawful till expiation. And if both the husband and wife apostatise together and then return to the original faith, they would still be under the zihar[33].

In all that has been said with regard to the effect of zihar, it is implied that the zihar is absolute and perpetual. But when it is limited in point of time, as if it were for a known time, as a day or month, or year, then, if he approaches her within the time, expiation is obligatory on him but if he does not approach her till the expiration of the time, expiation is dropped and zihar itself is cancelled[34].

Thus, the effect of zihar may, in nutshell, be summarized as follows:

Prohibition of Sexual Intercourse:

The effect of zihar is that it simply prohibit the person who

33. Ibid.
34. Ibid.

pronounces it from sexual connection with his wife as well as from kissing, embracing or touching her and similar acts until he shall have made expiation. The marriage is not, however, dissolved by mere zihar.

Matrimonial Rights of Wife:

The wife is entitled to call her Muzahir husband to pay her maintenance allowance and on his failure to do so, she can approach the court. The court shall force the Muzahir (one who has pronounced a zihar) husband either to perform the necessary expiation or on his failure to do so, to divorce his wife. The Court should give the husband three months time either to make expiation or to return to his wife or to divorce her. If the husband fails to do either, the court can restrict his food and water, starve him and even beat him to compell him to do one of the alternatives. The court can also imprison the husband till he either makes the expiation or divorces his wife. But the Judge cannot himself pronounce a divorce on behalf of the husband.

Expiation:

Another effect of zihar is that it becomes obligatory on the part of a Muzahir to make an expiation if he intends to have intercourse with his wife after the zihar. But if he is determined that she should remain unlawful to him, and has no intention of returning to matrimonial intercourse with her he is not liable to expiation. When he has once resolved on renewing such

intercourse and expiation has in consequence become incumbent on him, he may be compelled to make it but if he again determines to refrain, the necessity for expiation would drop and so also if either of the parties dies after the resolution to renew[35].

The expiation for zihar is the emancipation of an absolute slave of whom the husband is the owner and who is in possession of all his useful capacities without any exchange and with the intention of making expiation. It makes no difference whether the slave is Muslim fidel, male or female an infant or adult. When a slave has been emancipated without any intention of expiation, but intention is super added after the emancipation has taken place, the expiation is not lawful when a man has incurred two zihar and has emancipated two slaves without intending to particularize one to each zihar the expiation is lawful[36].

When a Muzahir can not obtain a slave to emancipate the proper expiation is for him to fast for two consecutive months which do not include the month of Ramadhan nor the day of Idul-fitr (the festival which follows the Ramadhan) or of Nuhr (the day of sacrifice the 10^{th} of Zil-Hijjah) nor any of the days of Tasreeh (three days after nuhr i.e., the 10^{th} of Zil-Hijjah). If the husband has intercourse with the wife to whom he is a Muzahir during the day, whether through forgetfulness or willfully, he must

35. Supra Note 24, p. 326.
36. Ibid.

recommence the fast, according to Imam Abu Hanifa and Imam Muhammad and if it was willfully in the day, the fast must be recommenced according to them all when the intercourse is with another woman than the one whom he is Muzahir, then, if the intercourse be one which vitiate the fast, it must be recommenced, by general agreement; and if it be not one that vitiates the fast, there is no necessity for its renewal. When expiation is by fasting and the fast is broken by reason on any cause, such as sickness, or a Journey, it must be recommenced. When the Muzahir eats during the fast of Zihar through the forgetfulness of his fast, it would not harm[37].

When the Muzahir is unable to fast, he must feed sixty poor persons. In this respect the Fakeer and Miskeen[38] are alike. It is not lawful to give to any one out of his expiation to whom it is not unlawful to give out of zakat with the exception only of poor zimmees to whom it is lawful to give out of expiation. According to Imam Abu Hanifa and Imam Muhammad the poor should be preferred. But it is not lawful to give any of it to the poor enemies, though they may be living within the Muslim territory. When the Muzahir has directed another to feed poor for him and it is done, the expiation is lawful but the person so directed has no right to recourse

37. Ibid. p. 329.
38. Both words are applicable to person in want. By the term Fakeer is to be understood, a person possessed of property, the whole of which amounts to less than a nisab; by miskeen means a person who has no property. A nisab is the lowest amount assessable to Zakat.

against him on account of food bestowed, for, it is susceptible of being a Loan (karz) oral gift and recourse can not be had by reason of doubt. If, however, in giving direction he had said, "On condition that you may have recourse against me", the person directed might have such recourse[39].

Application of Zihar in India and Pakistan:

The doctrine of zihar is very rarely used in India and Pakistan. It is proved by the fact that there is no case law on the subject. But doctrine of zihar is still applicable to Muslims in India and Pakistan. Section 2 of the Muslim Personal law (Shariat) Application Act, 1937, and clause IX of the section 2 of the Dissolution of Muslim marriage Act 1939 make it clear[40].

Section 2 of the Muslim Personal Law (Shariat) Application Act 1937 reads as follows:

"In all the cases regarding dissolution of Marriage including zihar, the rule of decision in cases where the parties are Muslim shall be the Muslim Personal Law".

Section 2 Clause IX of the Dissolution of Muslim Marriage Act 1939 provides;

"On any ground which is recognised as valid for the dissolution of marriage under Muslim Law:

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39. Supra Note 4, p. 54.
40. Supra Note 32, p. 503.

This is a residuary provision covering other grounds such as khula Mubara'at, Tafwid, Ila, Zihar and lian, as mentioned in the Shariat Act, 1937.

The Holy verses enshrined in the Qur'an, the Ahadith reported from the Holy Prophet (PBUH) and the opinions expressed by Islamic Jurists belonging to all the four schools regarding the institutions of zihar lead to the unrebuttable conclusion that mere husband's comparison of his wife with his mother or any female relation within the prohibited degrees does not by itself dissolve the marriage but its legal effects are that the carnal connection as well as every other conjugal familiarity, such as, kissing and touching, becomes unlawful till he has expiated himself by performing the penalty as is enjoined in the sacred writing of Holy Qur'an as well as directed by the saying of the Holy Prophet (PBUH).

However, if the Muzahir husband fails to perform the expiation for the zihar or persists to his utterance of zihar, then the wife shall have the right to approach the court either for judicial separation or for a regular divorce on the ground of zihar invoking Section 2 Clause IX of the Dissolution of Muslim Marriage Act 1939.

Thus the law of zihar, too like the law of ila, protects the wife against a particular kind of desertion by the husband. This law too does not put in the hands of the husband just one more' form of arbitrary divorce.

Here the husband may be keeping away from the wife after rendering her haram (absolutely prohibited) for him by describing her as his mother or sister etc. with whom marriage is permanently prohibited. In this case also the husband is expected to expiate and resume cohabitation but unlike Ila, there is no fixed period for resumption of cohabitation after zihar[41].

The law of zihar, too, has a statutory recognition under due Shariat Act 1937. Therefore, an Indian wife whose husband has deserted her by Zihar can, sue for faskh under Section 2(iv) of the Dissolution of Muslim Marriage Act, 1939. At the commencement of the hearing if the husband expresses his willingness to resume cohabitation, the suit may be dismissed. If he persists in keeping away from the wife after zihar, the judicial divorce may be granted[42].

41. Tahir Mahmood: *The Muslim Law of India*; p. 107, 2nd ed. (1982), Law Book Co. Allahabad.
42. Ibid. p. 108.

CHAPTER – VIII

DIVORCE BY LIAN: CONCEPT AND PROCEDURE

Conceptual analysis:

Under the Islamic law a person who slanders another is liable to Hadd-ul-Kazf (the specific punishment for slander). Moreover, when a man accuses and maligns his wife of adultery, in majority of the cases, he escapes the punishment to be inflicted for the slander. Therefore, in order to restrain the slanderer and subject him to a definite penalty for accusation as well as to enable the wife to clear her reputation by taking an oath in public against the charge of adultery, it was provided that when a charge of adultery was made against a woman, the accuser and accused were bound to proceed to the Qazi and mutually take oath prescribed by law. This exercise is popularly known in Shariah as Lian[1].

The term Lian is derived from the word 'Lan' the literal meaning whereof is "to put away or drive away" because one who is subjected to Lian is put away from all the pervading mercy of God. Technically, it signifies a form of divorce by means of invoking curse. Here it means to drive away from the mercy of Allah on account of imprecations involving the curse and wrath of Allah. When a husband accuses a lawfully wedded wife of adultery directly or indirectly as when he denies the paternity of a child born of her during wedlock, she has a right to apply to the Qazi to

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1. *Fatawa-i-Qazi Khan*: Translated & edited by Maulvi Mohammad Yusoof Khan; Vol. II, p. 153, (1986) Kitab Bhawan New Delhi.

order the husband either to support his accusation by taking the special prescribed oaths or to admit the falsity of his charge. This procedure of taking oaths is called Lian and consists in giving of evidence or testimony in person by the husband as well as by the wife before the Qazi. The oaths are strengthened by imprecation of curse and the wrath of God. The Lian becomes due when the husband accuses his wife of adultery under such circumstances that if he had made the accusation against any other woman then he would be liable to prosecution for defamation[2].

Therefore, making by the husband and denial by the wife of a charge of adultery on oath and invoking the curse and wrath of God by each on oneself, if swearing falsely, is called Lian.

Lian in shariah means the giving of evidence or testimony by the husband and wife, each in person, four times in the presence of Qazi, such evidence or testimony having been strengthened by oath. The husband's evidence being further accompanied by the use of word lan or curse of Allah and the evidence or testimony of the woman being further accompanied by the use of word Ghazab or wrath of Allah, the evidence of the husband standing in the place of Hudd-i-Qudhuf; so far as the husband is concerned i.e., the husband having accused the wife of zina or adultery, he would have been liable to the punishment of kuzuf or slander but for this procedure the punishment for slander is extinguished and Lian takes place

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2. Ibid.

and so far as the woman is concerned, her evidence standing in place of Hadd-e-Zina, i.e. the punishment of zina having become extinguished. The Lian takes the place of punishment for Zina. So far as the woman is concerned, she invokes the wrath of Allah when giving evidence is more destructive in its effect than punishment. The condition for the validity of Lian is subsistence of the relationship of the husband and wife and that nikah is Sahih and not invalid. The cause of Lian is the husband's accusing the wife of zina under the circumstances that if such accusation had been made against a stranger woman, it would make him liable to Hadd-e-Qudhuf, i.e., to say the wife should be Muhsinah and Afifah i.e. one not having the reputation of the committing zina. The pillars of Lian are the evidence or testimony four in number strengthened by the use of the oath by God. The effect of Lian is that after the Lian is made it is unlawful for the husband to have the sexual intercourse with the wife. The person fit to make Lian is a man who is qualified to give testimony[3].

According to the Hedaya, Lian in the language of law, signifies testimonies confirmed by oath, on the part of a husband and a wife (where the testimony is strengthened by an imprecation of the course of God on the part of the husband and of the wrath of God on the part of wife) in case of the former accusing the latter of adultery. Therefore, if a man slanders his

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3. Anwar Ahmad Qadri; *Islamic Jurisprudence in the Modern World*; p 395; 2nd; ed. 1981, Lahore-Pakistan.

wife i.e. he accuses her of whoredom or deny the descent of a child born of her by saying, "this is not my child", and she requires him to produce the ground of his accusation, imprecation is incumbent upon him provided both the parties are competent to testify on oath, that is to say, they are of sound mind adultery, free and Muslim and that the woman is of a description to subject her slanderer to punishment[4].

Religious Sanction of Lian

Holy Qur'an :

In case of a Lian the husband accuses the wife of adultery but he has got no witness to prove it and the wife denies it. Both the husband and the wife go to a Qazi (Judge) and take mutual cursing. There shall be accusation of adultery four successive times and the wife must deny the accusation each time it is uttered. At the fifth time, the husband invokes curse upon himself if he is false and the wife upon herself if she is false in the denial of adultery. After the parties have thus proceeded, they are separated forever by the decree of the Qazi.

The instant principle of Lian derives the religious legal sanction from the following verse of the Holy Qur'an which says:

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4. *The Hedaya*; Translated by Charles Hamilton, Vol.IInd,P.123,Kitab Bhawan Delhi.

"And those who launch
A charge against chaste woman
And produce not four witnesses
To support their allegation.
Flog them with eighty stripes,
And reject their evidence ever after;
For, such men are wicked transgressors[5]*."*

Describing the procedure of Lian the Holy Qur'an further says:

"And for those who launch
A charge against their spouses
And have in support
No evidence but their own;
Their solitary evidence
Can be received if they bear witness four times with an oath by God
That they are solemnly telling truth.
And the fifth oath (should be) that they solemnly Invoke the course of God,
On themselves if they tell a lie[6]*."*

And the fifth oath
Should be that she solemnly
Invoke the wrath of God.
On herself if her accuser
Is telling the truth,
If it were not for God's grace and mercy
Is oft returning full of wisdom
Ye would reuined indeed[7].

5. Holy Qur'an; XXIV; 4.
6. Holy Qur'an; XXIV: 6-7.
7. Holy Qur'an; XXIV: 8-9.

Occasion of the revelation of above verse:

The occasion for the revelation of this verse is said to be the case of Hilal b. Omayyad. Ibn Abbas reported that Hilal imputed adultery to his wife with Sharik bin Sahma in the presence of Apostle of Allah. The verse of the Qur'an regarding slander of woman had been revealed before them in which it is laid down," those who accuse woman of reputation (of adultery) and produce not four witnesses (of the fact) flog them with the eighty stripes and never accept their evidence." The Holy Prophet (PBUH) there upon asked Hilal to produce four eye-witnesses or to undergo the punishment of eighty stripes. Hazrat Hilal expressed his inability to produce the witnesses and said, "O Messenger of Allah, when one of us sees a man upon his wife, must he go away to look for witnesses?" The Holy Prophet (PBUH) again asked him to bring proof or undergo the prescribed punishment. Hilal then said," I am certainly a truthfulman; let Allah reveal what will prove me not guilty for the prescribed sentence. Then the Qur'anic verse," And those who launch a charge against their spouse but have no witness except themselves; reciting till he reached", One of those who speak truth", was revealed. The Prophet (PBUH) then returned and sent for them, and they came to him. Hilal stood up and testified and Holy Prophet (PBUH) was saying; Allah knows that one of you is a liar. Is there one of you to repent? She got-up and testified. When she came near five times, they prevented her and said that it would make

(punishment) obligatory. Ibn Abbas said; Then she stopped and delayed till we thought that she would return. Afterwards, she said; I shall not dishonour my people for all times. Then she went away. The Holy Prophet (PBUH) said: Look at her; if she gives birth to a child, black of eye balls, perfect of bones and fat of buttocks, it is for Sharik b. Sahma[8].

Explaining the principles enshrined in the verse XXIV: 6 and 7 of the Holy Qur'an as to the Lian, Abdullah Yusuf Ali comments that the case of married person is different from that of outsiders. If one of them accuses the other of unchastity, the accusation partly reflects on the accuser as well. Moreover, the link which unites married people, even where differences supervene, is sure to act as a steadying influence against the concoction of false charges of unchastely particularly where divorce is allowed (as in Islam) for the reasons other than unchastely. Suppose a husband catches a wife in adultery. In the nature of things four witnesses or even one outside witness would be impossible. Yet after such an experience, it is against human nature that he can live a normal married life. The matter is then left to the honour of the two spouses. If the husband can solemnly swear four times to the fact and in addition invokes a curse on himself, if he lies, that is, prima facie evidence of the wife's guilt. But if the wife swears similarly four times and similarly invokes a curse on herself, she is in law acquitted

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8. *Sunan Abu Dawud*: English Translation with explanatory notes by Prof. Ahmad Hasan: Vol. II, p.608 (1985) Al-Madina Publication, Delhi.

of the guilt. If she does not take this step, the charge is held proved and the punishment follows. In either case, the marriage is dissolved as it is against nature that the parties can live together happily after such an incident[9].

Commenting on the verse another noted Islamic Jurist Maulana Syed Abul A'Ala Maududi writes that those who accuse their wives but have no witnesses except themselves, the evidence of one of them is that he shall swear four times by Allah and declare that he is true in his charge. Then the fifth time, he shall declare that Allah's curse be upon him if he is false in his charge. As far the woman is concerned it shall avert the punishment from her if she swear four times by Allah that the man is false (in his charges) and the fifth time she invokes Allah's wrath upon herself, if he be true in his charge. If Allah had not shown you His grace and mercy and if Allah had not been most forgiving and all wise you would have been in great fex because of accusing your wives[10].

The whole object of introducing this procedure as to making of Lian was intended to prevent the husband and wife receiving the punishment prescribed respectively for slander and adultery which should have been inevitable because of the stringency of law as to evidence. In a proceeding of Lian, the curse on the part of the man becomes a substitute for Hadd-ul-

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9. Abdullah Yusuf Ali : *The Glorious Qur'an*: Translation and commentary; p. 1104, 2nd ed. (1977), American Trust publication. Canada.
10. Syed Abul A'Ala Maududi: The Holy Qur'an: Translation and Brief Notes With Text; p. 555, 2nd ed. (1987), Lahore-Pakistan.

Qaduf (specific punishment for slander) and the Ghazab or wrath on the part of the wife becomes a substitute for Hadd-e-Zina (specific punishment for adultery) and the invoking of wrath of Allah when giving evidence are more destructive in its effect than punishment.

Lian and Ahadith:

The principle and procedure of Lian described by the Holy Qur'an has been translated into reality by the Holy Prophet (PBUH) of Allah in the following cases reported in the Ahadith book which are reproduced here;

Sahl b. Saad al-Saidi said that Uwaimir bin Ashqar al-Ajlani came to Asim bin Adi al-Ansari and said to him; "O Asim, tell me about a man who finds a man along with his wife. Should he kill him and then be killed by you or how should he act? Ask the Apostle of Allah (PBUH) about it. Asim then asked the Apostle of Allah (PBUH) about it. The apostle of Allah disliked the question and denounced it. What Asim heard from Apostle of Allah fell heavy on him. When Asim returned to his family, Uwaimir came to him and asked; what did the Apostle of Allah (PBUH) say to you? Asim replied; you did not do good to me. The Apostle of Allah disliked the question that I asked him. Thereupon Uwaimir said; I swear by Allah, I shall not leave until I ask him about it. So Uwaimir came to the Apostle of Allah (PBUH) while he was sitting in the midst of the people. He said; Apostle of Allah, tell me about a man who finds a man along with his wife.

Should he kill him then be killed by you, or how should he act? The Apostle of Allah (PBUH) said; A revelation (Qur'an: XXIV:6) has been sent down about you and your wife so go away and bring her. Sahl said; so we cursed one another while I was along with the people who were with the Apostle of Allah. Then when they finished, Uwaimir said; I shall have lied against her, Apostle of Allah, if I keep her. He pronounced her divorce three times before Apostle of Allah. Apostle of Allah (PBUH) commanded him to do so.[11]

Narrated Sayeed bin Zubair; I asked Ibn Umar; what is verdict if a man accuses his wife of illegal sexual intercourse? Ibn Umar said, "The Prophet (PBUH) separated (by divorce) the Couple of Bani-al-Ajlan and said to them, Allah knows one of you (two) is a liar, so will one of you repent? But both of them refused. So he separated them by divorce. Ayyub a sub narrator said, Amr bin Dinar said to me, there is something else in this Hadith which you have not mentioned. It goes thus; the man said, 'what about my money i.e. the Mahr, that I have given to my wife? It was said, you have no right to restore any money, for if you have spoken the truth (as regards the accusation) you have also consummated the marriage with her; and if you have told a lie, you are less rightful to have your money back.[12]

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11. *Sahih-Al-Bukhari*: Translated by Dr. Muhammad Muhsin Khan; Vol. VII, p. 174, (1984) Kitab Bhawan New Delhi.
12. Ibid.

Narrated Sayeed bin Zubair: I asked Ibn Umar about those who are involved in the case of Lian. He said: The Prophet (PBUH) of Allah (PBUH) said to the spouses who invoked curses on each other; your accounts are in Allah's hands. One of you is a liar and you (the husband) have no right over her and she is divorced. The man said, what about my property (Mahr)? The Holy Prophet (PBUH) said, "you have no right to get back your property if you have told the truth about her, then your property was for the consumation of your marriage with her and if you told a lie about her then you are less right full to get your property back."[13]

Narrates Abdullah bin Masud; we were in mosque on the night of a Friday; suddenly a man from Ansar entered the mosque and said: If a man finds a man along with his wife and declares (about her adultery), you will flog him or if he kills, you will kill him, or if keeps silence, he will keep silence in anger. I swear by Allah, I shall ask the Apostle of Allah (PBUH) about it. On the next day he came to the Apostle of Allah and said; if a man finds a man along with his wife and declares (about her adultery), you will flog him or if he kills you will kill him, or if he keeps silence, you will keep silence in anger. He said, O'Allah, disclose. He kept on praying until the verses regarding invoking courses (Lian) came down; "And for those who accuses their wives but have no witnesses except themselves". So the man was first involved in this trial from among the people. He and his wife

13. Ibid.

came to the Apostle of Allah (PBUH). They invoked cursed on each other. The man bore witness before Allah four times that the thing he said was indeed true. He then invoked curse of Allah on him the fifth time if he was a liar. She then wanted to invoke curse of Allah on him. The Prophet (PBUH) of Allah said; Do not do that. But she refused, and did so i.e. invoked curses. When they returned, he said; Perhaps she will give birth to a black child with curly hair.[14]

The effect of the combined reading of the Holy verse XXIV: 6 of the Qur'an and Ahadith is that if a man who accuses his wife of immorality and he does not have witnesses to support the accusation, should swear four times by Allah that he is truthful and the fifth time that Allah's wrath be on him if he tells a lie. Similarly the wife can save herself by swearing four times by Allah that her husband is a liar and the fifth time by swearing that Allah's wrath be on her if her husband is speaking truth. The case of Uwaimir Ajlani also makes it clear that after the reported incident husband and wife were separated from each other after invoking curses. According to Imam Malik and Imam Shafi'i, the separation was effected by invoking curses. Abu Hanifa maintains that Judge i.e. the court should separate them.

Moreover, the Lian is applicable only in that situation when the husband is unable to produce four witnesses in support of his accusation

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14. Supra note 8, p. 607.

against his wife. Therefore, when the four eye-witnesses of adultery are produced, the judge or court has no power to pass order for Lian.

Capacity for Lian :

As a general rule only those persons are competent to take Lian who have the capacity to appear as witness in any case. It means that they should be adult and possessed of the sound understanding. Thus, if a husband is a minor and has not attained discretion or is a lunatic or is dumb, no Lian is incumbent on him. As a matter of fact he is not liable to conviction even for a slander. Similarly, if the wife is a child of tender age or is a lunatic or is dumb, she is not entitled to claim Lian. The disability of a dumb person is due to the fact that he or she cannot repeat the prescribed oath by speech. Also because such a person is not capable of accusing a woman of adultery in words while his signs may be misunderstood and imprecations are not incumbent unless the accusation is expressed in words. Lian is, however, applicable when both the spouses or one of them is blind.[15]

Further to have recourse to Lian under the Hanafi law, the husband and wife should be Muslims, adults and of sound mind. It is also necessary that the wife should not be a slave girl or a Christian or a Jews even when married to a Muslim. This is based on a tradition that the Holy Prophet (PBUH) has said that there are four classes of women on whom Lian is not

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15. K.N.Ahmad: *The Muslim Law of Divorce*: p. 462, (1984) Kitab Bhawan New Delhi.

incumbent, namely, Jews, and Christians married to Muslims, and slaves married to Muslims and free woman married to slaves. But some Jurists hold that Lian can be resorted to even when the wife belongs to a revealed religion because the verse of the Qur'an quoted here in before does not restrict the word wife to Muslims only. It is also necessary that neither of the spouses should have been convicted previously for slander because on being punished for slander the husband or wife's evidence cannot be admitted afterwards in any case even if he or she repents. According to Imam Shafi'i, his credibility shall be restored by retraction or repentance. The same rule applies to wife also.[16]

Imam Shafi'i, Imam Malik and Ahmad bin Hanabal do not debar a woman of a questionable character or a non-Muslim or a slave girl from having recourse to Lian. Under Shafi'i law Lian is incumbent even when the husband is dumb because his signs are equivalent to spoken words.[17]

Imam Shafi'i holds that a husband may with impunity accuse his wife of unchastity even though he be unable to furnish legal proof when he knows for certain that she has been guilty of it or when he has grave and well founded suspicion upon the subject or when the woman's guilt is of public knowledge as when she and adulterer were surprised by some one in the act of her misconduct.[18]

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16. Ibid p. 463.
17. *Ibid p. 464.*
18. Ibid.

The Shia Law of Lian is practically the same as the Sunni law. It is laid down in the Sharai al-Islam that there can be no Lian with respect to a woman married by Mutah or temporary marriage. The wife should not be deaf or dumb. The husband should not be blind because then he is incapable of witnessing the wife's guilt. It is not necessary that proceedings of Lian should be held before the Qazi. The parties can agree to follow the proceeding before any particular Mujtahid, a duly qualified learned man in fiqh.[19]

Procedure of Performing Lian :

The special procedure prescribed by Islam for performing Lian is laid down in the Holy Qur'an (XXIV: 6 & 8) which has been explained by the Muslim Jurists (Faqih) as follows.

The Qazi (Judge) first should ask the husband either to take the prescribed oath or to admit the falsity of his charge against his wife. In the latter case he renders himself liable to punishment for slander but the marriage shall not be dissolved. If the husband refuses to do either, he shall be imprisoned till he either takes the prescribed oath or admits the falsity of his accusation.[20]

However, if the husband persists in his accusation, the Qazi shall

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19. Ibid.
20 *The Durr-ul-Mukhtar*: English Translation by B.M.Dayal: p. 266(1992) Kitab Bhawan New Delhi.

first administer the oath to him (the husband) and the husband in the presence of the Qazi shall say four times, "I swear in the name of Allah that I am assuredly true in what I say about the adultery of this woman". After that the husband will be required to pronounce the imprecations by saying about himself, curse of Allah be upon me if I am untrue in the accusation of adultery that I have made against this woman, while pointing towards that woman. After this the Qazi should admonishe the wife and advise her to give up her demand, but if she persists, he would ask her either to take prescribed oaths or admit her guilt. If she refuses to take the prescribed oaths or to admit her guilt then, under the Hanafi Law, she shall be imprisoned till she complies with the Qazi's order. Imam Malik, Imam Shafi'i and Imam Ahmad bin Hanabal hold otherwise and state that she shall be punished for commission of adultery. If she admits her guilt of adultery, the marriage shall not be dissolved. But if she persists that her husband's accusation is false, then the Qazi shall administer to her the oaths. She shall say four times, "I swear in the name of Allah that the husband is assuredly a liar in the accusation of adultery that he has made against me and then pronounce the imprecations by saying a fifth time, "Allah's wrath descend on me if the husband is true in the accusation of adultery that he has made against me".[21]

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21. Ibid.

A denial by a husband that a child already born to his wife does not belong to him amounts to an accusation of adultery and the wife shall have the right to Lian. An accusation couched in ambiguous expression and made indirectly may not be considered sufficient for Lian. Thus, if a husband were to say to his wife, "Your pregnancy is not of me," the expression does not necessarily amount to a charge of adultery on the ground of uncertainty for, it is impossible that she may not be pregnant at all. This is according to Imam Abu Hanifa. But Imam Abu Yusuf and Muhammad hold that this statement shall amount to an accusation if a child is born to her within six months of the time of accusation.[22]

When both the parties have taken the imprecations and invoked the curse and wrath of Allah, the Judge is to order the husband to divorce his wife and on his refusal or failure to do so the Qazi shall himself dissolve the marriage.

Effects of Lian :

The effect of Lian is that the husband's having sexual intercourse with his wife-becomes forbidden so long as the Lian remains in force. If the husband after effecting Lian retracts i.e. he proves himself a liar, the prohibitory effect of Lian shall cease. After Lian (but before Qazi effects separation between the couple) if the husband retracts i.e., he confesses that

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22. Ibid.

he had falsely accused his wife, in such event, it shall be lawful for the husband (without entering into re-marriage) to have sexual intercourse with the wife. If the Qazi effects separation and thereafter the husband admits of his being a liar, the couple by mutual consent, may re-enter into fresh marriage contract. But if the Lian continues the wife in such event shall continue to remain forbidden to the husband. This is how the matter stands according Imam Abu Hanifa and Muhammad Al-Shabani. According to Abu Yusuf, however, a perpetual prohibition is created on account of Lian and they can never unite in marriage in any case as the Holy Prophet (PBUH), had said, "Those who effect Lian (both the parties) shall never unite." According to Imam Malik, Shafi'i and Ahmad bin Hanabal, everlasting separation shall get effected and in no case they would be able to reunite.[23]

Al-Shirani, the author of Al-Mizan al-Kubra, writes that the averments of Hazrat Umar, Hazrat Ali, Ibn Masud, Ibn Umar are also in accord with that Abu Hanifa to the effect that on account of Lian a restriction is placed on the sexual rights. When the husband belies himself i e. he admits himself to be a liar, the restriction shall get removed.[24]

Al-Shirani further writes that according to Imam Malik and Imam Bin Hanbal, the separation on account of Lian shall get effected but it

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23 *Al-Shirani Al-Mizanat-Kubra*, Vol II, p 127, Quoted by Dr. Tanzil-Ur-Rahman *A Code of Muslim Personal Law*, Vol 1st, p 506, (1978), Karachi-Pakistan

24. Ibid

should be accompanied by the order of separation from the Qazi. The assertion of Imam Abu Hanifa is same to that effect. It is a well know assertion of Imam Ahmad b. Hanabal that separation shall not get effected without the Lian of the wife and the order of the Qazi. The court official shall have to decree the separation between the couple. According to Imam Shafi'I, however, separation shall get effected on Lian being effected by the Husband because on the Husband's Lian the denial of parentage is established[25].

Imam Malik has expressed the opinion that a separation takes place when the husband and the wife have taken a prescribed oath even before the Qazi's order.[26]

According to Imam Shafi'i the husband's imprecation results in a separation between the parties without any order of Qazi. According to Shia law, the mandate relating to Lian is established by the Lian itself. The marriage gets dissolved ipso facto after the parties have taken the oaths.

Recognition of Lian under Modern Legislation:

Under the modern legislation, the doctrine of Lian is not obsolete but is still enforceable and often resorted to in India and Pakistan according to the procedure adopted by the Courts. The Muslim Personal Law (Shariah)

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25 Dr. Tanzil-Ur-Rahman; *A Code of Muslim Personal Law*, Vol. 1, p. 507 (1978) Karachi, Pakistan.

26. Ibid.

Application Act, 1937 and the Dissolution of Muslim Marriage Act, 1939, fully support this view. Section 2 of the Muslim Personal Law (Shariah) application Act, 1937 reads as follows:

"Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including Talaq, Ila, Zihar, Lian, Khula and Mubara'at, maintenance, or dower, guardianship, gifts and trust properties and wakfs (other than charities and charitable institution and charitable and religious endowments) the rule of decision in cases where parties are Muslims shall be the Muslim Personal Law (Shariat)".

Section 2 Clause (IX) of the Dissolution of Muslim Marriage Act, 1939, provides for the dissolution of marriage on any other ground recognised as valid for the dissolution of marriage under Muslim Law. Hence a wife can still claim the dissolution of her marriage under doctrine of Lian.

It is contended sometimes that after the passing of the Dissolution of Muslim Marriage Act, 1939, a marriage can be dissolved only on the basis of a false charge of adultery having been made by the husband against his wife. This contention is not correct for the following two reasons, namely:

That section 2 of the Act[27] provides that a wife shall be entitled to get a decree for the dissolution of her marriage on any one or more of the following grounds. The various grounds have been enumerated in Clause (i) to (ix) of the said Act.

Clause IX of the section 2 of the Dissolution of Muslim Marriages Act, 1939 reads as under:

"On any other ground which is recognised as valid for the Dissolution of marriage under Muslim Law".

It is clear from the said provision that a marriage which can be dissolved under the provision of Muslim Law can also be dissolved under the provisions of this Act.[28]

Secondly, the Dissolution of Muslim Marriages Act, 1939 has considered it sufficient to state in a general way that a marriage can still be dissolved on any ground recognised as sufficient by Muslim law. The legislature must have thought it necessary to clear this point so that a doubt be not entertained that after the passing of the Act, a marriage could be dissolved only on the basis of the grounds specified in the Act and on no other grounds. The Act has not given the procedure to be adopted as that is clear from any book on Muslim law. Thus, the Act has not given the various provisions of Muslim Law relating to Lian, ila and zihar which is given in all books on Muslim Law. As a matter of fact, the Act has not

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27. Section 2 of the Dissolution of Muslim Marriage Act, 1939.
28. The Act Refers to the Dissolution of Muslim Marriage Act 1939.

mentioned all the grounds deemed sufficient for dissolution of marriage by Muslim Law nor the procedure to be adopted in those cases. Thus, a marriage can be dissolved when only wife of a person embraces Islam. A marriage can, therefore, be dissolved not only on the basis of Lian but on several other grounds also.[29]

The question now arises whether doctrine of Lian can still be applied entirely in its old form or whether it has become inapplicable. To determine this question, it has to be seen that doctrine of Lian consists of two different and distinct parts namely;

i) the investment of a certain legal right in the wife accused of adultery and (ii) the procedure to be adopted for the endorsement of the wife's legal right. The first part constitutes substantive law while the second part merely amounts to procedure. As the Muslim law of marriage and divorce is still applied to the Muslim the substantive portion of law shall govern them[30].

The Pakistani courts have accepted this proposition and have expressed the view in several cases. In the case of *Mst. Leelan v/s Rahim Bukhsh*[31], the high court of Bahawalpur held that the procedure prescribed by the Muslim law for establishing legal rights arising from the doctrine of Lian was not permissible in courts for the simple reason that the Muslim

29. Supra note 15 P. 485.
30. Ibid.
31. P.L.D., 1951, B & J. 91.

law of evidence has been superseded by the Evidence Act. In this case Mst. Leelan had sought separation from her husband Rahim Bukhsh on the ground, amongst others, that her husband accused her of having illicit connections with some other person. The husband in his written statement admitted of his accusing the wife of unchastity and of being unfaithful to him.

In another case of Lahore High Court, *Ghulam Bukhsh v/s Husaina Begum*[32] the Court held that the procedure for Lian was the result of circumstances which no longer exist. This procedure would be wholly out of place in the present state of law, and, at the same time, there would be no jurisdiction of civil court to compel compliance with it. The procedure of Lian was the result of law of Islam relating to slander and adultery. It was a concession shown to the husband and wife. Before the Pakistan court, the husband does not ask for such a concession and the wife does not stand in the need of any for, adultery of wife is not punishable at all. Nor has civil court the authority to force any person to take an oath in the form prescribed by Lian and to send him to jail for refusing to take such oath. This impossibility of compliance with the procedure of Lian is by itself an argument in favour of the contention that an accusation of adultery without recourse to the procedure of Lian is a good ground for dissolution. However, the doctrine of Lian is still accepted by Indian Courts as a valid Muslim Law procedure.

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32. P.L.D. 1957, Lahore at 998.

In the famous case *Nur Jahan bibi v/s Mohd. Qazim Ali*[33] where on husband bringing a false charge on wife (Lian) the court granted the wife the decree for dissolution of marriage under section 2 (ix) of the Dissolution of Muslim Marriage Act, 1939. It was observed by the court that the doctrine of Lian had not become obsolete. The practice is based on the tradition. The husband and wife both have to take oath inviting God's curse on liar. If the husband's charge is proved, the wife loses the ground for dissolution. If he fails, she can get the divorce as well as sue the husband for defamation under the Indian Penal code for bringing a false charge of adultery amounts cruelty against the wife and attracts section 2 clause (viii) of the Act, and the exception I under section 499 of Indian Penal code would not apply.

So far as the point of view that courts have no authority to enforce the procedure of Lian is concerned, section 2 of Muslim personal Law (Shariat) Application Act, 1937 can be referred to in rebuttal. The various methods of dissolution of marriage as envisaged in the Act expressly include divorce, Khula, Mubarat, ila and Lian which the courts have been empowered to enforce. It is however, correct to say that courts cannot enforce the procedure of Lian to avoid Hadd-al-Qadhaf and Hadd-al-zina because both these acts are not crimes in India and Pakistan. But so far as dissolution of marriage through Lian is concerned, the courts under the provisions of section 2 of the Muslim Personal law (Shariat) Application

33. A.I.R. 1977, cal. 90.

Act, 1937 could be held to be empowered to dissolve the marriage contract.[34]

To call Lian a concession may be correct as it is a view warranted by the consequences. But it does not by itself, in any manner, affects its legal status. It is however, correct, that under Pakistan Penal Code adultery and accusation of not being crimes, it is futile for couple to have recourse to Lian for the solution to their problem. i.e. to escape punishment prescribed in Qur'an.[35]

To say that civil courts cannot compel one to take oath by way of Lian is questionable. If the contention of the non-authority of civil courts in this respect be held to be correct then the right of Dissolution of marriage contract through Lian, as certainly referred to and provided by section 2 of the Shariat Application Act, 1937 shall be unwarrantably frustrated. Likewise, to say that civil courts in the even of one refusing to perform Lian have no authority to commit him or her, as the case may be, to Jail is implied in the order for Lian itself. Besides, in the event of non-compLiance of their order courts have, in any event, the power of awarding tazir (punishment) which includes punishment of imprisonment. The courts act as Qazi in the matter of Dissolution of Muslim Marriages.

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34. Supra note 25 P.131.
35. Ibid.

It does not appear correct to say that to put the procedure of Lian into practice is impossible. Indeed, this much may be said that primary purpose of Lian (Protecting the husband from Hadd al-Qadhaf and wife from Hadd-Al-zina) has been negatived by omissions of India as well as Pakistan Penal Code. But law relating to separation of a couple on account of Lian still subsists. In any case, an amendment in the Dissolution of Muslim Marriage Act, 1939 can be made specifically permitting Lian.

The courts have held that accusation of adultery is by itself a good cause for the dissolution of marriage. This may be said to be correct when accusation is proved to be false, but if same is proved to be true would the court in that event hold merely the accusation of adultery a reasonable cause for effecting separation.

Concluding remarks:

After going through Qur'anic injunctions, Ahadith and cases concerning Lian, the following conclusion are drawn:

That Lian must be observed in the presence of a Judge or Qazi. It is not effective in private company.

That it is the duty of the Qazi to awaken the consciousness of both the husband and wife to the grave responsibility they are undertaking. The

false oath and baseless slandering are heinous crimes which invoke the wrath of Allah.

That at the conclusion of Lian, the separation is declared by the Qazi officially. This is view held by Imam Abu Hanifa, which is supported by the Ahadith that after Lian, the Messenger of Allah (PBUH) made a declaration of separation between the husband and wife. There are other Jurists who think that Lian automatically annuls the marriage.

That separation effected by Lian is forever and the husband as well as wife cannot be united again with the help of nikah under any set of circumstances as it is possible in case of divorce.

The Mahr (dower) paid by the husband to the wife cannot be taken back by the former in case of Lian, even if his allegation is correct.

If the husband, after leveling charge of fornication against his wife, refrains from invoking a curse upon himself (Lian), he would be treated as a criminal. Most of the Jurists are of the opinion that he should be punished as a slanderer and awarded eighty stripes. Imam Abu Hanifa is of the view that he should be imprisoned. If the woman hesitates at the point of invoking curse, she should be stoned to death because it proves her guilt. Imam Abu Hanifa suggests imprisonment for her too and not stoning as taking of oaths four times by man and then invoking curse by him and the

reluctance on the part of woman in invoking curse strengthen the idea that she might have committed fornication, but these oaths and imprecations do not stand parallel to four witnesses which are essential to establish the charge of adultery.

CHAPTER – IX

MUSLIM WOMEN'S RIGHT TO DISSOLVE MARRIAGE UNDER THE STATUTORY LAW

Dissolution of Muslim Marriages Act, 1939 – Historical Perspective:

Dissolution of Muslim Marriages Act, 1939 is regarded as most revolutionary legislative enactment among the existing statutory measures relating to the status of Muslim woman in the Indian sub-continent. This is only legislative measure which introduced a substantive reform in the Islamic Law of divorce provided by the various schools applicable to the Muslims of undivided India. The various grounds incorporated in the Act on which a Muslim woman may seek a decree for the dissolution of her marriage is also popularly known as "Faskh" which means annulment or abrogation. It comes from a root which means to annul a "deed" or to rescind a bargain. Hence, it refers to the power of the Muslim Qazi (in India Law Court) to annul a marriage on the application of the wife. The method by which the said Act was proposed to be enacted is known as Takhayyur (electic choice) and signifies replacement of the principles of one school of Islamic law adhered to in a particular region or by particular people with those of any other school.[1]

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1 Asaf A.A. Fyzee; *Out Lines of Muhammadan Law*; p. 168, 4th ed. (1974),Oxford University Press, Delhi.

The Qura'anic verse on the basis of which the instant Act, (1939) was adopted and enacted finds expression in Sura al-Nisa of the Holy Quran wherein it is laid down:

> *"If ye fear a breach between them twain,*
> *Appoint two arbiters,*
> *One from his family and other from hers,*
> *If they wish for peace, God will cause their reconciliation.*[2]

The power of the Qazi or Judge to dissolve the marriage in the exercise of power under the Dissolution of Muslim Marriages Act, 1939 also commands the support from the express words of the Holy Prophet (PBUH) who is reported to have said:

> *"If a woman be prejudiced by a marriage, let it be broken off".*[3]

This fundamental principle was accepted by all the schools of Islamic law, but in respect of circumstances in which it should be applied and the procedure through which a woman's marriage could be dissolved, the schools of Islamic law greatly differed from one and another. At one extreme there was the Maliki School which allowed Qazi to dissolve a woman's marriage on a wide variety of grounds. On the other extreme, there was the Hanafi School which

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2 *Holy Qur'an*: IV: 35.

3. *Sahih Al-Bukhari*: Translated by Prof. Muhammad Muhsin Khan, Vol. VII, P.16, (1984) Kitab Bhawan, New Delhi.

greatly restricted women's right to the dissolution of marriage by a Qazi, specially by a non-Muslim Judge.[4]

India is dominated by the followers of the Hanafi school, since, for Muslim wives Hanafi school did not sanction divorcing right so being suffocated they started embracing Christianity. Some Muslim Jurists laid down a principle that in such cases the marriage would not stand dissolved and that woman would be imprisoned till she returned to Islam. In British India this device could not obtain application. In India, courts applied another rule of Islamic Law under which in case of apostasy of a Muslim woman who refused to return to her original faith would result in the dissolution of her marriage.[5]

During the first half of the 20th century, many Muslim women, to get rid of their marriage, sought a refuge under the aforesaid principle. As prior to the passing of this Act, (Dissolution of Muslim Marriage Act 1939), the classical Hanafi law consisted no provision whereby a Muslim wife could seek divorce on such grounds as disappearance of husband, his long imprisonment, his neglect of marital obligation etc. Finding no other way to get rid of undesirable marital bonds, many Muslim women felt compelled by

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4. Tahir Mahood; *Muslim Personal Law*, p.54, 1st ed. (1972), New Delhi
5. Ibid.

their circumstances to renounce their faith. Muslim organisations and scholars in India became alive to the situation and began thinking of ways and means to check the growing tendency among Muslim women to renounce Islam just because their religious law did not allow them to lawfully get rid of their disliked husband. The Jamiat-ul-Ulma took-up the task. It was found that there was no way out but to secure legislation empowering Muslim Judges in India to dissolve the Muslim women's marriages in some given circumstances. The Ulma, therefore, decided to make recommendation for such a law. Leaders of public opinion educated in western style like K.J. Khambatta and Mrs. Hamid Ali took the active interest in the matter and argued by their writings for the legislative recognition of Muslim woman's right to seek judicial divorce.[6]

The Jamiat-ul-Ulma prepared a comprehensive draft bill in the year 1935 on the basis of a well-known book 'Al-Hilat-al-Najiza (a lawful device) written by Maulana Ashraf Ali Thanvi. Maulana Thanvi in his book described in detail the principles of Maliki law by applying which Muslim judges could dissolve a Muslim marriage in the circumstances specified therein. He found the provisions of Maliki school more suitable to the circumstances as

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6. Supra note 4, p.55.

against the corresponding provisions of Hanafi school. On this issue he consulted the leading Ulma of the Hejaz and even personally approached some of them in order to sure that the change proposed to be effected in India did not contravene any religious principles of Islam. The book was published in Arabic and Urdu language in the year 1932 and the appendices to the book consisted the approving opinions regarding the contents of book of other theological schools in the country.[7]

Maulana Thanvi wrote in his book that Muslim parliamentarians should introduce a bill based on the recommendations made therein. Accordingly, the bill was prepared by Jamiat ul-Ulma and same was introduced in the central legislative council by Muhammad Ahmad Kazmi on 17th April 1936. The government of that time did not agree with that provision of Bill which was to enact a condition that only a Muslim Judge, whether at the District level or in a High Court, could dissolve the marriage of a Muslim woman. The government warned if this provision was insisted upon, it would not proceed with the Bill at all. Moreover, in order to effect uniformity, the select committee to which the bill was referred to be recommended that its provisions

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7. Maulana Ashraf Ali Thanvi: *Al-Hilat-al-Najizabi Millat-e-Azza*; p.10 (1932) quoted by Tahir Mahmood; Muslim Personal Law: p.56, 1st ed. (1972) New Delhi.

should apply to all Muslims of India irrespective of their sectarian distinction. Besides this, other changes were made in original bill[8].

The statement of objects and reasons issued with the bill read:

> *"There is no provision in the Hanafi code of Muslim Law enabling a married Muslim woman to obtain a decree from the court dissolving her Marriage in case the husband neglects to maintain her, makes her life miserable by deserting or Persistently maltreating her, or absconds Leaving her unprotected for or under certain Other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi law causes hardship, it is permissible to apply provisions of the Maliki, Shafai'i, or Hanabali Law. Acting on this principle the Ulema have issued Fatawas to the effect that in cases enumerated in Clause 3, part A of this Bill (Now section 2 of the Act) a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be in the book called Hilat Al-Najeza published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki Law which under the circumstances prevailing in India, may be applied to such cases. This has*

8. Ibid.

been approved by large number of Ulema who have put their seals of approval on the book.[9]

The bill was, ultimately, passed by the British Legislative assembly with suitable modifications and became law on 17th March 1939, as "Dissolution of Muslim Marriages Act, VIII of 1939 and ever since it has been hailed as one of the most progressive enactment passed by the legislature within recent years. The Act is applicable to all the Muslims in India who may otherwise adhere to Hanafi, Shafai'i, Ithna Ashari or Ismaili Law. The Act is in force throughout India except in the state of Jammu and Kashmir, where a parallel enactment by the name of Jammu and Kashmir state Dissolution of Muslim Marriages Act, 1942 is in force with some different provisions to the central Dissolution of Muslim Marriages Act, 1939.[10]

The Act is divided into two parts. One part of the Act specifies the grounds on, and those circumstances in which a court may grant a decree for the dissolution of a marriage at the instance of wife. The second part relates to the effect of conversion and re-conversion. The two parts together make exhaustive and complete code.[11]

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9. Gazette of India, part V, p.36, (1938).
10. Syed Khalid Rashid; *Muslim Law*; p.110, 3rd ed. (1996) Eastern Book Co. Lucknow.
11. Dr. Saleem Akhtar; *Shah Bano Judgement in Islamic Perspective (A Socio Legal Study)*; p.64 1st ed. (1994) Kitab Bhawan, New Delhi.

In Jamila Khatoon v/s Qasim Ali[12], the Nagpur High Court held that the Act had only crystallized a portion of Islamic Law and should therefore, be applied in conjunction with the general provision of Islamic family law. In several decisions courts have claimed that the Act of 1939 as a piece of declaratory legislation to ameliorate the hardships caused to Muslim women by enlarging their rights.

Section 2 of the Dissolution of Muslim Marriages Act, 1939 specifies nine grounds on which a Muslim wife may seek dissolution of marriage. These grounds are based mainly on the two principles, they are:

(a) Sub-clauses (i) to (iv) are based on the theory that a suspension of the marriage justified dissolution of marriage. (ii) Sub-clauses (v) to (viii) are based on the theory that the continuance of marriage under such circumstances would be injurious to the wife.

The Act is a remedial piece of legislation and as such it is entitled to receive liberal construction so as to suppress the mischief and advance the remedy, on the other hand, the Act is declaratory. It does not add to nor is designed to add to the ground of dissolution of Muslim marriage recognised by one or other

12. A.I.R. 1951, Nag. 375.

schools of Muslim Law. Looked at from this point of view, the legislation is not innovative and must be construed keeping in mind the fundamental tenets and value system informing Islam.[13]

Grounds of decree for Dissolution of Marriage:

Section2 of the Dissolution of Muslim Marriages Act, 1939, lays down the following grounds on which a Muslim woman can seek divorce. The Sec 2 of the Act 1939 reads as under:

"A woman married under Muslim Law shall be entitled to obtain a decree for the Dissolution of her marriage on any one or more of the following grounds, namely:

(i) That the whereabouts of the husband have not been known for a period of four years;

(ii) That husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) That the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) That the husband was impotent at the time of marriage and continues to be so;

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13. Supra note-11, p.65.

(vi) That the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.

(vii) That she having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated marriage before attaining the age of eighteen years.

Provided that the marriage has not been consummated;

(viii) That husband treats her with cruelty, that is to say –

(a) Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) Associates with the women of evil repute or leads an infamous life, or

(c) Attempts to force her to lead an immoral life, or

(d) Disposes of her property or prevents her exercising her legal rights over it, or

(e) Obstructs her in observance of her religious profession or practice, or

(f) If he has more wives than one, does not treat her equitably in accordance with the injunctions of Quran.

(ix) On any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that...

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on the grounds under clause (i) shall not take effect for period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties the court shall set aside the said decree; and

(c) Before passing a decree on the ground under clause (v) the court shall, on the application by the husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent and if the husband so satisfied the court within such period, no decree shall be passed on the said ground.

The opening words used in the section are, a woman married under Muslim law and not a married woman. This protects women who have already abjured Islam in the hope of getting their marriages dissolved and are thus no longer Muslims. Had the words Muslim women been used, it would have been possible to argue that a woman who had apostatized could not get benefit from the

provisions of this Act as she was no longer a Muslim. But the use of expression "married under Muslim law", makes it possible for a woman who have given up Islam to get their marriage dissolved on any of the grounds given in the said Act.

The grounds on which a decree for dissolution of marriage can be passed by the courts under the Act are proposed to be examined in brief in their order.

[Section 2, Clause (i)]

Missing of Husband for Four Years:

A wife whose husband has been missing for a long time is deprived of protection, companionship, and pleasure of life and financial support. She is naturally put to great hardship on that account. It, therefore, becomes necessary for her under such conditions to marry another person of her choice. But she cannot do so, because her first marriage still subsists. It, therefore, becomes necessary not only for her but also in the interest of society at large to release her from the marital tie if she so whishes.[14]

Practically every nation offers some kind of statutory relief to a wife the whereabouts of whose husband has not been known for a long period. In India prior to the passing of Dissolution of Muslim Marriage Act, 1939, a Hanafi Muslim wife was not allowed to seek the dissolution of her marriage from the law court on the ground of disappearance of her husband for a long period. However, under the said Act, at present, in India a woman married under the Muslim law is entitled to seek the dissolution of her marriage on the ground that the whereabouts of her husband has not been known for a period of four years. She can then on such order having been passed

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14 K.N. Ahmad: The Muslim Law of Divorce; p.501, (1984), Kitab Bhawan New Delhi.

legally contract a second marriage. The court shall effect the dissolution of marriage between the person whose whereabouts has not been known and his wife on the expiry of a statutory period of six months from the date of passing a decree dissolving the marriage under section 2 clause (i) of the Dissolution of Muslim marriage Act 1939.[15]

Section 2 clause (i) of the Dissolution of Muslim marriage Act, 1939 is reproduced as under:

> *"A woman married under the Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on the ground:*
>
> *That the whereabouts of the husband have not been known for a period of four years provided that...*
>
> *"A decree passed on the ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties the court shall set aside the said decree.*[16]

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15. Tahir Mahmood: *The Muslim law of India*; p.99, (1980) Law Book col. Allahabad.
16. Section 2 clause (i) read with proviso (b) of Dissolution of Muslim marriage Act, 1939.

The clause based on the Maliki Law is an improvement on it because according to Maliki law, the wife of a person whose whereabouts is not known shall have the right of contracting another marriage after waiting for four years from the time when the Qazi passes a decree for the dissolution of her marriage. But according to clause (i) of section 2 of the Act, 1939, the waiting period of four years does not commence from the time of the Qazi's or judge's order but begins from the time when the husband is proved to have disappeared. A wife can file a suit under the provision of clause (i) of the Act at any time on the expiry of four years from the time of disappearance. Moreover, the court shall not ask her to wait any longer but shall decree her suit if other requisite conditions are satisfied. The wife shall have to produce evidence to the effect that the people who should have known the whereabouts of her husband have not been aware of him for a period of four years.[17]

However, when the wife seeks dissolution of her marriage on the ground of missing of her husband, the court shall before decreeing the suit, give notice of her suit to all the heirs of the husband and to his brothers and his paternal uncle. Each of these persons will have the right to be heard. If the court passes a decree

17. Supra note 15, p.100.

of faskh (Dissolution of marriage), it shall remain in abeyance for six months. During this period if the husband comes back and court is satisfied of his willingness to perform his conjugal duties, the decree shall be set aside. If the husband is not traceable or is traceable but has failed to satisfy the court of his willingness to perform his conjugal duties. Until the expiry of six months from the date of decree, the marriage will stand dissolved with effect from date of decree.[18]

Religious basis of Law:

The Shariah law about the missing of a person is based on the following tradition in which the Holy Prophet (PBUH) is reported to have said with respect to the wife of a person whose whereabouts is not known.

> *"Suwar Ibn Musab narrates from Mughira Ibn Shabah through Siurabhil Hamdani that Mughira stated that Holy Prophet (PBUH) said" the wife of a person of unknown whereabouts shall remain his wife till a statement about him is available".*[19]

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18. Ibid., p. 101.
19. *Muwatta Imam Malik*: Translated with exhaustive notes by Prof. Mohammad Rahimuddin; p.527 (1981) Kitab Bhawan, New Delhi.

Following this tradition there has been considerable difference of opinion among the religious scholars as to the waiting period which entitles the wife to seek the dissolution of her marriage. Among the companion of Holy Prophet (PBUH), Hazrat Umar, Hazrat Uthman, Hazrat Ibn Umar, Hazrat Ibn Abbas and Hazrat Hasan Basri have ruled that the wife, the whereabouts of whose husband has not been know, should be ordered to wait for a period of four years. Hazrat Ali, Hazrat Ibn Masud, on the other hand hold the opinion that the wife of a person whose whereabouts is unknown should wait until the husband returns or the fact of his death is ascertained.[20]

According to Imam Abu Hanifa, the wife of a person whose whereabouts are not known can not be considered to have been released from the marriage till her husband's death is know with certainty. Imam Shafai'i at first agreed with Imam Malik and held that a missing husband would be presumed dead on the expiry of four years but subsequently he changed his opinion and adopted same view as expressed by Hanafi Jurists. Shafai'i law, therefore, is same as Hanafi law.[21]

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20. M. Mazheruddin Siddiqui: *Women In Islam*: p.73, 1st ed. (1980) Adam Publishers, Delhi.
21. Ibid.

Imam Malik has taken a more realistic view of the matter. According to him, a wife can apply to the Qazi for the dissolution of her marriage when her husband has been missing. The Qazi shall thereupon himself make a search or cause to be made for the missing husband and if he can not be traced, the wife shall have to wait for four further years. The husband shall then be presumed to be dead and the wife shall have to observe iddat period prescribed for husband's death which is normally four months and ten days. She can then contract a second marriage.

Imam Malik has fixed the period of four years on the basis of an order passed by Hazrat Umar, the second caliph who fixed such period at four years. The order of Hazrat Umar in this regard has been reported by Imam Malik in his noted book "Muwatta" as under:

> *"Said Ibn al-Musayyab reported that Hazrat Umar bin Al-Khattab said: If a woman's husband is missing and his whereabouts are not known to her, the wife should wait for four years, beginning from the date when news about him stopped and after completion on four years shw should sit in iddat for four months and ten days. After that period she is free to remarry".*[22]

22. Supra note 19, p. 528.

The jurists of all the schools have adopted the rules laid down by Imam Malik with regard to the waiting period which are more liberal and involves less hard ship to the wives of missing husbands. The waiting period of four years, thus, contained in section 2 clause (i) of dissolution of Muslim marriage act have been taken from Maliki law.

It would appear that even the Maliki law, which is followed now by all the schools, leaves room for hardship to the women of missing husband. It is said that while Hazrat Umar was carrying out his nocturnal vigil, he heard a woman singing erotic verses in which she gave expression to the unbearable pain of separation from her husband and added; "if there were no God, this bed would not have been empty of a male partner". Hazrat Umar found on inquiry that her husband was fighting on the war front. He came back home and asked her widowed daughter how long a woman could bear the pang of sexual abstinence. She told that him that six-months was the maximum period. This incident bears the testimony that six month is reasonable maximum period for which a wife can wait. If it is recognised that a woman cannot forgo sexual enjoyment for a period of more than six months, why should it not be applied to the cases of missing husband. How can the wife be forced to wait for four years if such compulsion is likely to drive her in to the

quagmire of sin and who is going to provide for her maintenance during all this period.[23]

Return of the husband on the expiry of four years:

A very pertinent question arises as to what order shall be passed if the husband whose whereabouts have been unknown, turns up on the expiry of four years and after the decree of the court has been passed and what shall happen if the wife, after observing her term of probation consequent to the dissolution of marriage, in meantime contracts marriage with another person.

So far as the first question is concerned, if the husband returns at the time when the wife is observing her term of probation he may have recourse to her as the marriage has not been terminated absolutely. If, however, wife after observing her term of probation has contracted marriage with another person what shall then happen. According to caliph Umar if the husband returns before the wife contracts another marriage, he shall have her as his wife whatever time may have passed. If the wife has already contracted her marriage with another person the right of her former husband lapses and he cannot have that woman as his wife,

23. See: Supra note 20, p. 74.

although she may not have had valid retirement with the second husband. Imam Malik has adopted the same opinion.[24]

The decision of Caliph Ali is at variance with the aforesaid decision of Hazrat Umar. According to Hazrat Ali, the wife in all the events shall be made over to the former husband inspite of her having children from the second husband.[25]

The ruling of Caliph Hazrat Uthman in this respect is stated to be that if the wife has contracted her marriage with another person and her former husband thereafter appears he shall be asked whether he wanted the return of his wife or the reimbursement of his paid dower. Action shall be then taken according to his choice. If he wanted the dower back the same shall be made to be returned to him. If he wanted his wife back she shall be made to get herself separated from her second husband and after completing her term of probation she shall be made to return to her former husband by contracting the marriage a new. If the second husband had cohabitation with her, he shall be made to pay her unpaid dower.[26]

In India and Pakistan the decree of dissolution of marriage shall not take effect for a period of six months from the date of

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24. Dr. Tanzil-Ur-Rahman; *A code of Muslim Personal Law;* Vol. I, p. 627, (1978) Karachi-Pakistan.
25. Ibid.
26. Ibid.

decree. But there is no ruling in the Books of fiqh in support of keeping a decree of court under suspension for a period of six months. The period of six months that has been fixed for putting the decree into effect apparently means that if the missing husband does not return within the period of six months after the decree of dissolution is passed or returns but is not prepared to fulfil the marital obligations of a husband within such period, the decree shall become effective i.e. separation shall take effect and the wife shall start observing her term of probation. The question arises what shall happen if the husband returns after six months but within the period of observation of term of probation. Under the Dissolution of Muslim Marriage Act, 1939 there is no answer of it. It is also not clear whether the decree of separation shall have force of a revocable divorce or an irrevocable divorce.

There are appreciable differences in the laws in Islamic countries relating to this subject. In Iraq the period of absence of the husband is at least two years whereas in Egypt, Morocco and Jordan the period of one year is held sufficient for right of demanding a decree of separation.

The second kind of difference in this connection is that in Tunisia in the event of the husband's whereabouts becoming

unknown the right of demanding separation accrues only when the husband neither leaves sufficient property nor makes arrangement for the maintenance of the wife during his absence. Contrary to this in several other Muslim countries, the existence or non-existence of property for meeting maintenance expenses cannot impede the right of wife of demanding separation.

The third difference pertains to the effect and result of such separation. Under the Syrian law, it has been made clear that on demand of separation, in the event of husband's absence or his being imprisoned such separation shall be affective and will be equivalent to the effecting of a revocable divorce. Where as in other Muslim countries such separation has been made equivalent to effecting of an irrevocable divorce[27].

27. Tahir Mahmood; *Personal Law in Islamic Countries*: p. 41, 1st ed. (1987), Academy Law and Religion, New Delhi.

(Section 2 Clause (ii))

Husband's failure or Negligence to Provide for maintenance:

The obligation of a Muslim husband to maintain his wife is a matter of status, not of contract, and if comes within the ambit of the general principle of union of persons as husband and wife upon which depends almost all the religious, moral and legal rights and duties that either of spouse may acquire by marriage. The marriage covenant gives rise to certain reciprocal spousal rights and obligations and if either the spouse fails or neglects to perform his or her poet of obligations, he or she shall no longer be entitled to enjoy the rights vested in him or her. It is one of the divinely ordained matrimonial obligations of the husband that he must provide for maintenance to his wife during the subsistence of the marriage according to his financial means and resources.[28]

The Almighty Allah describing the nature of this obligation enjoins in His Holy Book:

> *"Let the man of means spend according to his means: And the man whose resources are restricted, Let him spend according what Allah has given him, Allah puts no burden on any person beyond what he has given him"*[29]

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28. Supra note 11, p. 34.
29. Holy Qur'an; LXV:7

No doubt, the instant Holy Verse cast upon the husband the obligation to provide for maintenance to his wife according to his available resources but this obligation is not absolute but subject to the fulfillment of corresponding duty cast upon the wife. The wife, in order to be entitled to it, must faithfully perform the duties devolving on her by her marriage contract. It is the duty of the wife to afford her husband happy conjugal companionship and if she fails to give it and turns to be refractory (Nashizah) or unsubmissive, she shall not be entitled to any maintenance from her husband.[30]

Description of Maintenance:

The term maintenance i.e. 'Nafqah' signifies all those things which are necessary to the support of life such as, food, clothes and lodging and also includes such thing as are necessary according to the custom of a country and a particular class of people, such as, cosmetics, cleaning soaps, hair oil and articles of domestic use.[31]

Author of 'The Durr-Ul-Mukhtar describes that term Nafaqa literally means that which a man spends over his children; in law it means feeding clothing and lodging and in common use it signifies food.[32]

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30. *The Durr-ul-Mukhtar*: Translated by B.M. Dayal; p.318, (1992), Kitab Bhawan, New Delhi.
31. *The Hadaya*: Translated by Charles Hamilton Vol. II, p. 140, (1985), Kitab Bhawan, New Delhi.
32. Supra note 30, P. 316.

Thus, in most of books on Muslim Fiqh, food, clothes and residence have been described as the articles to be given for the maintenance. This gives impression that maintenance is restricted to only these three items. But such is not the case and it would be wrong to hold that maintenance consists only these items. The word maintenance in its broader sense means and includes all those things which are essential for the dignified survival of a wife having regard to his living standard. What constitutes essential for the dignified survival of a woman depends upon the financial condition of husband and social status of wife and it differs from place to place and way of life of different people and would also change with the change of time and place. Imam Abu Hanifa and Imam Malik have made position more clear by ruling that no amount of maintenance has been fixed by Holy Qur'an or sunna and it depends on the financial condition of husband and wife and social condition of the country and it changes under different conditions and standard of life in a particular country.

Effect of failure or negligence to provide for maintenance:

All the schools of Muslim law, except the Hanafi school, recognise that a marriage may be dissolved by a decree of court if the husband fails or neglects to provide for maintenance his wife. The three Imams, Shafai'i Malik and Ahmad Ibn Hanabal hold that a

Qazi may order the dissolution of marriage only at the instance of wife because maintenance is her divine right and if she does not make any such demand, marriage shall continue. The juristic opinion of the great Imams is based on the Holy verse of the Qur'an which says," *Keep them (wives) in kindness or separate from them with humanity*"[33].

Imam Malik argue in the light of instant Holy verse that a husband who does not or cannot provide maintenance allowance to his wife, he cannot provide maintenance allowance to his wife, he can not be said to be keeping his wife with humanity. He must, therefore, in view of the Holy verse separate himself from his wife i.e. he must divorce her. On his refusal to do so, he must be separated by an order of the Qazi. Imam Shafai'i says that once Abu Hurayra (May Allah please with him) asked Holy Prophet (PBUH) about a person who can not maintain his wife. He was told that two should get separated [34].

Imam Abu Hanifa is of the opinion that the Qazi shall not effect dissolution of marriage between the couple merely on the ground of husband's failure to provide maintenance to his wife. In such a case the Qazi shall direct the wife to arrange for maintenance

33. Supra note 24, p. 643.
34. Ibid.

either from her own resources or by borrowing in the name of her husband till her husband has easier time. Under the Hanafi law, the Qazi shall not dissolve the marriage even if the husband is incapable of providing maintenance due to his poverty or otherwise. Thus, the failure or negligence of the husband cannot be made the basis of dissolution of marriage in any case. The Hanafi jurists in support of their argument refer to Surah Al-Talaq verse seven (LXV:7) which lays down, *let the man of me one spend according to his me one and the man whose resources are restricted let him spend according to what Allah has given him.* They also argue that there were many companions of Holy Prophet (PBUH) who were too poor even then there is no example of any marriage having been dissolved on this ground.[35]

The opinion of Hanifi Jurists that marriage cannot be dissolved on the husband's inability or negligence to maintain the wife seems to be too technical and do not appear to take the realities of life into consideration. The opinion of Imam Malik, Shafai'i and Ahmad Ibn Hanabal seem to be sound and practical. Hence, it is necessary in such hard cases to adopt the law of other sunni sect and release the neglected wife from marriage bond by a decree of faskh [36].

35. Ibid, p.644.
36. Ibid.

Statutory Recognition:

The law laid down by the 'Maliki,' Hanabali and Shafai'i Jurists regarding a wife whose husband has either failed or neglected to provide maintenance allowance to his wife has been given statutory recognition in India by enacting section 2 clause (ii) of Dissolution of Muslim Marriage Act, 1939. The relevant portion of the said Act is reproduced here for references which reads as:

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on the grounds namely;

"that husband has neglected or failed to provide for her maintenance for a period of two years".[37]

The expression "has neglected or failed to provide for her maintenance" means willful negligence or failure on the part of the husband to provide for maintenance to his wife. A wife would not be entitled to decree of dissolution of her marriage on mere negligence or failure of the husband to provide for her maintenance for a period of two years where there is reasonable cause of such negligence or failure. The failure or negligence to provide maintenance on the part of husband must be proved to have been continuously for two years before the institution of suit in order to invoke the provision of section 2 clause (ii) of the Act. 1939.

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37. See: for detail: Section 2 Clause (ii) of Dissolution of Muslim Marriage Act, 1939.

Judicial Trend:

In the application of Section 2 clause (ii) of the Dissolution of Muslim Marriage Act, 1939, the courts in India have adopted two divergent opinions, one is textual and the other is normative. In one line of cases, the courts have emphasised upon the text of the section 2 clause (ii) of the Act and hold that a wife would be entitled to a decree for a dissolution of marriage if it is proved that the husband has failed to provide maintenance for a period of two years. In these cases the courts have not considered the circumstances or reasons for which the husband failed to provide maintenance. They have also refused to take into account the conduct of the wife. The leading judicial authority on the point is *Manak Khan v/s Mst. Malka Bano*[38] where the husband had been in Jail for several years and had consequently failed to maintain his wife without any willful intention. The husband's defence of non-willful neglect was disallowed. The court observed:

> *"Section 2(ii) of the Act, merely provides that woman married under Muslim law shall be entitled to obtain a decree for the dissolution of marriage on the ground that the husband has failed to provide maintenance for a period of two years. There is nothing in the wordings of this clause to suggest that*

38. A.I.R.; 1941; Lah. 167.

the failure must be willful. It is absolutely immaterial whether failure to maintain was due to poverty, ill-health or any other causes whatsoever".

In *Yusuf v/s Sowramma*[39] a girl of 17 years was married to the appellant who was twice of her age. After having lived for a month in her husband's house, she went back to her parents and lived separately for over two years. During this period the appellant admitted his failure to maintain his wife but alleged that he was willing to keep her with him. The court rejected husband's plea and upheld the decree for the dissolution of marriage. The court held that see for dissolution on the ground that she has not infact been maintained even if there is a cause for it. In the opinion of court, the reason why the husband has not maintained the wife for statutory period of two years is immaterial.

In the second line of the cases the courts taking into consideration the conduct of the wives have held that maintenance mentioned in clause (ii) of section 2 of Dissolution of Muslim Marriages Act, 1939 is the maintenance to which a Muslim wife is entitled under Muslim law. The Muslim law does not confer upon a wife an absolute and unconditional right to maintenance. A wife is

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39. A.I.R. 1971, Kr. 261.

not entitled to dissolution of her marriage when the husband has not been paying her maintenance on account of her own faulty conduct.

In Mst. Khatijan v/s Abdullah[40] the chief court of Sindh laid down that Dissolution of Muslim Marriage Act was not intended to abrogate the general principle of Mohammedan law applicable to Muslim, and the husband cannot be said to have neglected or failed to provide maintenance for his wife unless under general Mohammedan Law, he was under an obligation to maintain her. The court further pointed out that the right of the wife to obtain maintenance from the husband is subject to her living with him and if she refuses to live with him without reasonable cause then she is not entitled to maintenance and failure of the husband to provide her with maintenance would not entitle wife to seek dissolution of her marital tie.

In *Amir Mohd. V/s Mst. Bushra*[41] a division bench of Rajasthan High Court held that failure or negligence to provide maintenance in order to give rise to a claim for dissolution must be without any justification. For, if there is justification there cannot be said to be negligence. Negligence or failure, implies non-performance of a duty. But if the husband is released from duty on account of the conduct of the wife herself, or failed to provide maintenance.

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40. A.I.R., 19 43 Sind, 65.
41. A.I.R.1956 Raj., 102.

The attitude of the courts in first line of cases about the dissolution of marriage for want of maintenance on the part of the husband reflect that in order to succeed in a suit for dissolution of marriage all that a woman is required to do is to establish that for two years immediately preceding the suit, her husband has not provided her maintenance, and once that is established she will be entitled to a decree as a matter of course and the courts have not to go into question whether the woman herself has contributed towards the failure of her husband to provide maintenance for her and her refusal to stay with her husband or to refuse conjugal rights to him is no ground for refusing her claim for dissolution. This judicial craftsmanship is no more good law and cannot be justified in the light of general and specific injunctions of Islamic law which are of undoubted practical validity in as much as it permits the wife to enjoy the fruits of her wrong doing. The righteous conduct is a condition precedent for claiming the rights under Islamic law and any interpretation which contravenes this basic norm is not permissible by any stretch of imagination either by logic or law.

In the second line of cases, the courts have asserted that the wrongful conduct of wife ascertained or proved by the facts of particular case shall be a relevant consideration in the determination of her right to obtain dissolution on the ground of want of

maintenance for two years during the subsistence of marriage. In short this right of wife does not enjoy absolute or unqualified status and depends upon, beside other things, on the righteous behaviour of the wife. This point of view of court according to Shariah law is correct.

[Section 2 Clause (iii)]

Dissolution of marriage on the ground of husband's imprisonment:

If the husband is sentenced to imprisonment for a period of seven years or more, the wife shall have the right, from the date of order becoming final, of demanding dissolution of her marriage through a decree of court.

There is a difference of opinion on the question whether the wife has the right of demanding separation from the husband on account of his being sentenced to imprisonment. Infact, the basis of this right is the right of demanding separation by the wife on the ground of her husband's long absence. The Hanafi and Shafai Jurists are not convinced of right of separation of the wife on the ground of her husband's absence whose whereabouts is not known.[42]

According to Imam Malik and Ahmad bin Hanbal, however, the wife has such right. Shia Ulma also agree with the view points of Maliki and Hanbali Jurists and hold that the wife in such a situation has the right of demanding separation.[43]

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42. *Al-Shafai'i*; *Kitab al-Umm*; Vol. V; p.239; quoted by Dr. Tanzil Ur-Rahman: A code of Muslim Personal Law; Vol. I, p.639 (1978), Karachi, Pakistan.
43. Ibid.

The purpose of right of demanding separation on the ground of her husband's absence is to save her from every kind of anticipated matrimonial injury which may prove detrimental to the foundation of marriage. In this connection, the question of fixing the period of husband's remaining absent due to imprisonment is based on Ijtihad. The period in this regard may be fixed in accordance with the changing conditions of the society. According to Imam Ahmad bin Hanbal the wife has the right of demanding separation in the event of her husband remaining absent without any cause for the period of three years and according to some assertions the period of one year has been fixed.[44]

Legislative Development in India and abroad:

The statutory laws for the dissolution of marriage on the ground of husband's imprisonment have been enacted in India and in different Islamic countries. In India the wife has been given the right of demanding separation under section 2(iii) of the Dissolution of Muslim Marriage Act, 1939 in the event of her husband having been sentenced to imprisonment for seven years or more. The legislative position in neighboring country Pakistan is same. Section 2(iii) of the Act, 1939, reads:

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44. Ibid., p.640.

"A woman married under Muslim Law shall be entitled to obtain a decree for the Dissolution of her marriage on the grounds, namely:

(i) That the husband has been sentenced to imprisonment for a period of seven years or upwards;

The punishment prescribed for offences under I.P.C. are relevant and helpful for wife to obtain a decree for dissolution of her marriage. The imprisonment in other circumstances, for example, under the Preventive Detention Act, or as a prisoner of war, would not give a right to dissolve the marriage. The offence, alleged, to have been committed by the husband must have been tried by a court having a competent Jurisdiction to try the case and pass the sentence which must be for seven years or up wards[45].

However, a decree dissolving the marriage in the exercise of power vested in the court under Section 2(iii) of the Act 1939, be passed only after the sentence of imprisonment has become final i.e. it is no longer open to challenge in appeal or revision.

Section 14 of Egyptian Law on personal status 1985, lays down that if the husband is sentenced to imprisonment for a term of three years or more his wife on the lapse of one year of his

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45. Anwar Ahmad Qadri; *Islamic Jurisprudence in Modern World*; p.24, 1st ed. (1981), Lahore-Pakistan.

imprisonment shall, on the ground of injury caused to her, have the right of filing an application before the Qazi praying for a decree of irrevocable divorce inspite of the fact that enough property of the husband is there with her for her maintenance.[46]

Section 109 of the code of Personal Status 1977 of Syria provides that if the husband has gone away without any reasonable cause or is sentenced to imprisonment for more than three years, his wife can, after the expiry or one year from the date of absence or imprisonment, seek dissolution of marriage even if there is property from which she can get maintenance. The dissolution so effected shall be equivalent to a revocable divorce. If the absent husband returns or is released from the imprisonment while the wife is observing Iddat, he shall have the right of revocation.[47]

Section 93 of the code of personal status of Jordon provides that where the husband is sentenced to imprisonment for three years or more, the marriage may be dissolved after the wife has suffered at least one year of separation on that account.[48]

Section 94 of the code further provides that where a divorce is granted in accordance with the foregoing sections and woman

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46. Supra note 27, p. 41.
47. Ibid. p. 146.
48. Tahir Mahmood; *Family Law Reform in Muslim World*; p.83; (1972), New Delhi.

marries third person, subsequent appearance of the former husband shall have no effect on second marriage.[49]

Effect of separation due to imprisonment:

The decree of dissolution of marriage granted to the wife by the court under section 2(iii) of Dissolution of Muslim Marriage Act, 1939 on the ground of her husband's imprisonment for seven years or more shall be deemed to be a revocable divorce. The husband shall have the right of having recourse to his wife if he is released within the period of her probation (Iddat). The same is rule under the laws in Islamic countries. From the above stated law in India under Sec.2 (iii) of Dissolution of Muslim Marriage Act, 1939, as well as law in abroad it appears that right of demanding dissolution accrues to the wife with the sentenced passed for seven years or upward final of imprisonment of the husband. The wife need not wait for any more period for making demand for dissolution through court of law under said provision of Law[50].

It shall be appropriate, in the changing condition of the society and its fast degrading moral values, that provision relating to the period of seven years or more imprisonment contained in

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49. Ibid.
50. Tahir Mahmood: The Muslim Law in India. p. 102, (1980), Law Book Co. Allahabad.

section 2(iii) of the Act, 1939 be amended and reduced to two years to avoid hardship to the waiting woman, It may be pointed out that the term of two years has been prescribed under section 2(iii) of the Dissolution of Muslim Marriage Act, 1939 in case the husband has neglected or has failed to provide her maintenance. The period of imprisonment fixed in the statutes of other Muslim countries ranges from one to five years.

It shall be appropriate, in the changing condition of the society and its fast degrading moral values, that provision relating to the period of seven years or more imprisonment contained in section 2(iii) of the Act, 1939 be amended and reduced to two years to avoid hardship to the waiting woman. It may be pointed out that the term of two years has been prescribed under section 2 (iv) of the Dissolution of Muslim Marriage Act, 1939 in case the husband has neglected or has failed to provide her maintenance. The period of imprisonment fixed in the statutes of other Muslim Countries ranges from one to five years.

Section 2 Clause (IV)

Husband's failure to perform marital obligation:

Marriage vests some rights in the spouse and devolves some obligation on them. Under the Islamic matrimonial law, husband and wife have reciprocal rights and obligations towards each other. The division of social family responsibility between the couple is the necessity of a happy spousal life because each spouse specialise in his or her own sphere of life. It has been pointed out in the Holy Qur'an:

> *"The men are protectors*
> *And maintainers of women,*
> *Because God has given*
> *The more strength*
> *Than the other, and because*
> *They support them from their means... ".*[51]

The failure of the husband to perform the marital obligations which devolves on him may in some cases constitute grounds for the dissolution of marriage. Some of them have not been dealt with and discussed by Muslim jurists as main grounds for divorce but they may be as effective for dissolution of marriage as the other grounds and so attention is drawn to them hereunder.

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51. Holy Qur'an IV : 34

The guiding principle in the matter of husband's duty towards his wife is provided by the verse of Holy Qur'an wherein it is laid down:

"When ye divorce
Women, and they fulfil
Their Term of Iddat
Either take them back on equitable terms,
Or set them free on equitable terms
But do not take them back,
To injure them or to take undueadvantage
If any one does that
He wrongs his own soul"[52].

It is stated at another place in the Holy Qur'an:

"And women shall have rights
Similar to the rights
Against them, according
To what is equitable,
But man have a degree
(of advantage) over them,
And God is Exalted in power wise"[53].

As stated, one of the important objects of marriage is a happy companionship of the parties and with this object in view the husband has to perform certain marital obligations. But failure to perform marital obligations by a husband does not necessarily constitute a cause for dissolution of marriage. In some cases it may amount to a moral offence

52. Holy Qur'an II : 231.
53. Holy Qur'an, II : 228.

only but incase of the breach of some important obligation the wife gets a right to the dissolution of her marriage.

This right of the wife has been given legislative status in India and Pakistan by enacting Dissolution of Muslim marriages Act, 1939. In India and Pakistan a muslim wife can get her marriage dissolved under the provisions of the Act, VIII of 1939 on the ground of her husband is failure to perform marital obligations for a specified period. Section 2 clause (IV) of the Act, making the provision for it reads as under:

A Woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely;

> that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.

The Section has not described or mentioned the marital obligations of the husband and so we have to rely on Muslim law to find them. A husband has four main obligations towards his wife under Muslim law:

(i) To maintain his wife in manner suitable for his wealth.

(ii) To observe equality between his wives if he has more than one.

(iii) To make available to her a personal apartment and

(iv) To allow her to visit and be visited by her parents and blood relations.

The first two grounds have been covered by clauses (ii) and (VIII) of Section 2 of the Act, 1939. The breach of last two obligations has been made specific grounds for the dissolution of marriage by invoking clause (IV) of Section2 of the Dissolution of Muslim Marriages Act, 1939.

In case of Ila the husband declares that he would not have carnal connection with his wife for four months or more upon which he is said to have given her Ila. Here, under clause (iv), when the husband has infact abstained from his wife's sexual company without reasonable cause for a period of three years or more, the wife is afforded a ground to sue for the dissolution of the marriage and the clause goes beyond that and it covers the desertion by the husband which means total repudiation of obligations of marriage. However, if the husband fails to perform his marital obligations due to misconduct of wife herself or due to some cause over which he has no control or a cause in which she had consented, the wife can not get the marriage dissolved by invoking clause (iv) of the section 2 of the Dissolution of Muslim Marriages Act 1939. Thus, if the husband goes away to a foreign country for further studies or for business purpose with the consent and at the instance of wife, she will not be entitled to have her marriage dissolved on that ground. Similarly when he is compelled by circumstances, such as illness or imprisonment for three or more years but less than seven years, she will not get remedy under this clause.[54]

54. Syed Khalid Rashid: Muslim Law; p.112, 3rd ed. (1996) Eastern Book Co. Lucknow.

If the husband is too poor to provide his wife a separate residence for herself, this will probably be a reasonable cause for the husband not to perform the marital obligation enjoined by Muslim law. But under Shafai'i law it is not so. A gross failure to perform marriage obligations i.e. not caring to the call of the wife and not consummating the marriage may be good ground for refusing a decree for conjugal rights.

Where the wife refuses to live with the husband and does not allow sexual intercourse or is otherwise disobedient unless refusal or disobedience is justified by non-payment of prompt dower or any other cause, she cannot have her marriage dissolved under clause (iv) of section 2 of the Act, 1939.[55]

The Islamic matrimonial law ordains explicitly the spouses to perform their reciprocal obligations so that they may lead a happy and prosperous life. It is, therefore, absolutely necessary that they should treat each other with kindness and affection. It is negation of this obligation, namely, unkindness towards the wife that may in extreme cases entitles a wife to separation. Unkindness when reaches to such a degree as to amount cruelty is a ground for divorce under Muslim law, as in many other systems of law. The Muslim law gives the notion of kindness a wide and realistic meaning. Thus, it includes the husband's implied permission to the wife to

55. Ibid.

visit or receive her parents once a week. According to one report the parents and her children by a former husband can visit her at any time.[56]

If a wife's father is a cripple or ill and there is no one to attend on him, the wife can go to look after him even against the wishes of her husband and she will not be considered to refractory in such a case. It is obvious that she will feel very miserable on account of her anxiety for her helpless father and kindness demands that in such circumstances she should be allowed to attend on him.

The wife can see her relations within the prohibited degree as a matter of right. According to one report she can do so once a month. According to another report she can do so only once a year and this is considered to be the more approved report. This later opinion may perhaps be based on the difficulties that were experienced formerly in travelling. But in modern times travelling has become easy and safe and there is no reason to deny the right to the wife to see her brother or sister more often than once a year. In any case period of one year is unreasonably long and it seems equitable to adopt other view.

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56. Ibid.

(Section 2 Clause (v))

Impotency of Husband as a ground of dissolution of Marriage:

It has been made clear in the foregoing chapters that the objects of the Islamic matrimonial law is not confined to the procreation of children and lawful enjoyment of sexual passions but the real divine motive behind it is to secure and establish a happy and cordial companionship between two members of the opposite sexes. If this sole object seems to be failing beyond reconciliation, for whatsoever reasons, separation is recommended in the interest of parties as well as society. Therefore, when the husband is unfit of effectively consummating the marriage due to his impotency, the companionship can not remain happy. It becomes extremely difficult and miserable for a wife to continue with such a non-functional husband by remaining within the limits of Shariah. Islam lays stress on the husband to satisfy the natural sexual desire of wife and not to neglect this important obligation without reasonable cause. Therefore, if a husband passes his nights in offering prayers and days in fasting so that he may not intimate with his wife and satisfy her natural desire, then on the complaint of wife, Shariah law authorizes the Qazi or court to order the husband to be intimate with the wife even at the cost of his worship. On this line of reasoning Muslim

Jurists allow the wife of a impotent person to seek dissolution of her marriage through a decree of court.[57]

The dissolution of a marriage on account of the husband's impotency also finds root in the following verse of Holy Qur'an which enjoins:

"The parties should either hold;
Together on equitable terms or,
Separate with kindness".[58]

Explaining the instant Holy verse of Qur'an, Muslim Jurists have stated that when a person is incapable of satisfying the natural desire of his wife due to the existence of impotency in him, he cannot be said to be holding his wife with kindness because impotency of the husband is a continuous injury and misfortune to the wife. Therefore, such a marriage is liable to be dissolved on the petition of wife.

Statutory Recognition of Right:

The wife's right to seek dissolution of her marriage on the ground of her husband impotency as provided under Shariah, has been given statutory recognition under Dissolution of Muslim Marriage Act, 1939. The relevant provision of the said act is as under.

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57. *Fatawa-I-Qazi Khan*: Translated and edited by Maulvi Mohammad Yusuf Khan: Vol. II, 41, (1986) Kitab Bhawan Hew Delhi.
58. Holy Qur'an; II229.

Clause (V) of Dissolution of Muslim Marriage Act; 1939:

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following ground; namely, That the husband was impotent at the time of marriage and continues to be so; provided that;

> *Before passing a decree on ground (V) the court shall, on application by the husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent and if the husband so satisfies the court within such period, no decree shall be passed on the said ground.*[59]

The Husband was impotent at the time of Marriage:

A women married under Muslim law can seek the dissolution of her marriage on the ground of her husband's impotency under section 2 clause (V) of dissolution of Muslim Marriage Act, 1939, when it is proved by her to the satisfaction of court that her husband was impotent at the time of marriage and continues to be so till the date of moving petition in the court.

The term impotency in ordinary sense means the inability of a man to perform effectively the act of Coition and in juristic

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59. Section 2 clause (V) proviso (C) of the Dissolution of Muslim Marriage Act, 1939.

terminology that man is impotent who inspite of having his organ is not capable of having sexual intercourse with his wife. The word impotency may also be defined as the incapacity of the husband or wife to be sexually intimate with the other or to allow or grant sexual gratification.[60]

The term impotency has been understood by the Judges in England in matrimonial cases as meaning incapacity to consummate the marriage, that is to say, incapacity to have sexual intercourse, which undeniably is one of the objects of marriage. The question is what does 'sexual intercourse means". Dr. Lusington states to this effect.[61]

> *"Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse. It does not mean partial and imperfect intercourse: Yet, I cannot go to the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that legally speaking, it is no intercourse at all".*

A full bench of Andhra Pradesh High court in *Kola Emmanuel*

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60. Supra note 30, p. 273.
61. Dr. Lusington; Quoted in *Ram Natrajan v/s Alexander Xavier Nathan*, A.I.R.1999, Mad. 238.

v/s Nallipogu Sunanda[62] held:

> *"The word impotency is not related to a particular gender like male only. It relates to either gender. The criterion is the practical impossibility of consummation of marriage on account of impotency of either the husband or wife. Incapability of copulation on the part of either of spouses either due to structural defects in organs of generation or due to some other cause resulting in non-consummation of marriage is impotence".*

Their lordship of Supreme Court in *Yuvraj Digvijay Singh v/s Yuvrani Pratap Kumari*[63]

> *"A party is impotent if his or her mental or physical condition makes consummation of marriage a practical impossibility. The condition must be one, according to statute, which existed at the time of marriage and continued to be so until institution of proceeding".*

From these decisions, it is clear that impotency, with reference to section 2 clause (v) of Dissolution of Muslim Marriage Act, 1939, means incapacity to consummate the marriage. Sexual intercourse means an ordinary and complete intercourse and it does not mean partial or imperfect intercourse. The incapacity to consummate the marriage may be due to mental or physical condition of either spouse

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62. 1998, A.I.C.H. 2297.
63. A.I.R.1970 S.C.138.

and as required under the statute, such condition existed at the time of marriage and continued to be so until the institution of proceeding.

According to classical Muslim law, a wife may bring a suit for the dissolution of her marriage on the ground of her husband's impotency when it is proved that she was ignorant, prior to the marriage, of the impotence of her prospective husband. But under clause (V) of section 2 of Dissolution of Muslim Marriage Act, 1939, it will be sufficient for the wife to prove that husband was impotent at the time of her marriage and continue to be so till the date of institution of proceeding.[64]

Proviso (C) to clause (V) of Sec. 2 of the Act, 1939 says that prior to the passing of a decree on the ground of the husband's impotency, the court shall, on the application of the husband grant him a time for a period of one year to get himself treated. If the husband within the specified period of one year satisfies the court that he is no longer impotent, the court shall set aside the suit of wife. Granting one year of time to an impotent person is a settled rule of Sharia law. The current law in India by addition of words," on the application of husband" has been brought closer to real spirit of Shariah law.

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64. Supra note 20, p. 72.

Under the Muslim law, a wife is not bound to exercise her right immediately on becoming aware of impotence of her husband. She can seek the dissolution of her marriage at anytime she likes provided her right has not been lost in the meantime. Thus, if the husband has in the meantime, managed to have consummation of marriage though only once, the wife shall lose her right.

Burden of Proof:

The general law of evidence regarding burden of proof is that it lies on the person who assert that certain thing exist.[65] Therefore, inorder to seek relief under section 2 clause (V) of Dissolution of Muslim Marriage Act, 1939, the wife is required to establish that her husband was impotent at the time of marriage and continue to be so until the institution of proceeding. A division bench of Delhi High court in *Rita Nijhawan v s Bal Kishna Nijhawan*[66] observed:

> *"It has to be positively proved that the respondent was impotent at all the material times i.e. right from the time of marriage till the institution of suit. The requirement is so strict that even if it could be shown that marriage was consummated just once during this period, a divorce of nullity can not be granted. The burden of proving that the respondent was impotent at all the material times is on petitioner".*

65. See for detail, Sections 101 to 103 of Indian Evidence Act, 1872.
66. A.I.R. 1973 Delhi, 200.

According to Muslim law the wife has also to prove that her husband has not been cured of his impotency within the time granted to him by court for this purpose. But this aspect of Muslim law, namely, burden of proving that the husband has not been cured within the time given to him, has been changed in India by passing Dissolution of Muslim Marriage Act, 1939. Under the said. Act, it is the husband who has to prove that he has been cured of impotence within the time given to him

Thus, wife's right to seek dissolution of her marriage on the ground of her husband's impotency given by the Shariah and its recognition by the state law is quite reasonable and humanitarian as it seek to secure happiness for the parties by releasing them from a unhappy and torturous bond.

Section 2 Clause (VI)

Insanity, Leprosy and Venereal Disease as a Ground of Dissolution of Marriage

The important objects of marriage are happy companionship between the spouses and lawful satisfaction of passions. If either of the spouse suffers from such a disease, physical or mental that his or her condition becomes repulsive or revolting to such extent that the other cannot tolerate his or her company or the condition of one of them is such that the other can not live with safety with him or her, the first object shall be lost and as a natural consequence the other object may also be lost. Again, the physical or mental condition of one of them may be such that he or she may be unable to perform the various obligations arising out of contract of marriage when the other spouse may feel very unhappy of this aspect of his or her marriage life and in such cases it will be very hard to bind that spouse to pass his or her whole life in misery and unhappiness. It is considered desirable under Muslim Law in such circumstances to dissolve the marriage and free the aggrieved spouse from the marriage tie[67].

This rule is based on the Verse of the Holy Qur'an in which it is stated:

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67. Supra note 14, p. 384.

"They (the women) have rights similar to those (of men) over them in kindness and men are a degree above them[68]"

This very clearly shows that the spouses have reciprocal rights and obligations against each other. If one of them is unable to perform his or her parts of the obligations cast on him or her by express or implied conditions of marriage contracts, he or she shall be deemed to be at fault and the other will become entitled to a relief on his account. The couple have been enjoined by the Holy Qur'an:

"The parties should either hold
Together on equitable terms,
Or separate with kindness[69]"

In the view of this Holy Verse, it is not just and fair for a husband to keep his wife tied to a marriage when she desires a separation from him on account of mental or physical disease in him. When a husband or wife is suffering from disease which makes a happy companionship between them impossible, it becomes necessary for a Qazi or court to give the aggrieved spouse relief in the matter by dissolving the marriage. Muslim law tries its best not to make marriage insecure but it refuses to sacrifice the happiness of a spouse to the rigidity of law. Once it is established that a wife or a

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68. Holy Qur'an; II : 228.
69. Holy Qur'an : II : 229.

husband can not live in peace and harmony with other, then it does not scruple to help the aggrieved spouse by dissolving the marriage because under such circumstances the marriage becomes a farce and its continuation undesirable[70].

The Muslim Jurists are unanimous on the idea to dissolve the marriage when one of the spouses is suffering from specified disease or defect. The basis of the rule is traceable in the Hadith which narrates:

> *"Let a marriage be dissolved when it is prejudicial to the interest of wife"*[71]

However, there is a difference of opinion amongst the Jurists on two points. The first point of difference is as to whether a husband has right to get his marriage dissolved through Qazi on the basis of a defect or disease in the wife. The second point on which the jurists differ relates to the defects or disease on the basis of which marriage can be dissolved.

As regard the first point, the Hanafi Jurists do not allow the husband the right to the dissolution of marriage through the Qazi on the ground of disease in wife. This is due to the fact that husband

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70. Supra note 31, p. 402.
71 *Sahih al-Bukhari*; Translated by Prof. Muhammad Muhsin Khan; vol.VII, p.16, (1954), Kitab Bhawan, New Delhi.

enjoys wide power of divorce and can exercise it when he is not happy with his wife. They deny this right to the husband also because they do not want to deprive the wife of any portion of her dower. They seem to consider that for better or for worse, she is your wife, and you must tolerate her condition. If you are not prepared to do so, you can divorce her and pay her dower.[72]

As regard to the second point, the jurists have mentioned different disease at various places in relation to some context but have not enumerated all of them at one place when laying down general rules for dissolution of a marriage on account of them. However, Imam Abu Hanifa, Imam Malik, Imam Ahmad bin Hanbal and Imam Shafi'i are unanimous on the point that if the wife finds that her husband has been suffering from insanity for a period of two years or is suffering from leprosy or a virulent venereal disease that hinders him in having sexual intercourse with her, she is entitled to seek separation from him through court.[73]

Dissolution on Account of Insanity:

Insanity means a state of mind in which one or more of the functions of feeling, knowing, emotion and willing is performed in an abnormal manner or is not performed at all by reasons of some

72. Supra note 70, p.403.
73. Ibid.

disease of brain or the nervous system and it includes lunacy, mental derangement, mental disorder, madness and so on.[74]

The Muslim Jurists have not differentiated these various classes of mental derangement and have used the word "Janun" in an exhaustive sense to include a lunatic, an idiot, an imbecile, an insane person or a person of unsound mind. By the word "Majnun", means a person who is suffering from all types of mental derangement. But in a technical sense and medical language they do not differ from each other. They only differentiate between a violent lunatic or a insane person and one who is peaceful.

Juristic Opinion:

There is a difference of opinion among the Jurists of all the four sunni schools about the presence of Janun (insanity) in one spouse forming ground for the dissolution of a Muslim marriage.

Imam Abu Hanifa and Imam Yusuf do not consider Janun (insanity) to be a ground for the dissolution of marriage. According to Imam Muhammad, however, the wife is entitled to demand separation by applying to a court and thus obtain a separation from her insane husband, provided, the madness of husband be of such a degree that her living with him is impossible.[75]

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74. See, Stepen; *History of Criminal Law*, vol.II, P.130.
75. Maulana Ashraf Ali Thanvi; *Al-Hilalat al Nijiza*; quoted by K.N. Ahmad: The Muslim law of Divorce: P.356 (1984) Kitab Bhawan, New Delhi.

According to Imam Malik if one of the parries is affected with insanity before the marriage, the other party is entitled to the dissolution of marriage. This is however, subject of the condition that the insane spouse should be violent or cause financial loss. If he or she is harmless, the other party has no cause for dissolution of marriage.[76]

Imam Shafi'i and Ahmad bin Hanabal are unanimous on the point that a spouse shall have right to the dissolution of his or her marriage when the other suffers from insanity or from similar serious disease irrespective of the fact whether disease was already present before the marriage or appeared subsequently and irrespective of the fact as to whether marriage has or has not been consummated.[77]

Thus, according to the three Imams, namely, Imam Malik, Imam Shafai'i and Ahmad bin Hanabal, the wife is entitled to the dissolution of her marriage from her husband on the ground of his being insane. The opinion of Imams correspond to the rule of law laid down by Imam Ibn Qayyim namely, "*if a marriage is prejudicial to the interest of wife so that she can not remain with her husband without risk to herself, let it be dissolved.*"

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76. Ibid.
77. Ibid.

The Supreme Court of India in *Ram Narain v/s Ramesh Wari*[78] held that the context in which the ideas of unsoundness of mind and mental disorder occur in the section as ground for dissolution of marriage requires the assessment of degree of mental disorder. The degree must be such as that the spouse seeking relief can not reasonably be expected to live with each other. All mental abnormalities are not recognised as ground for grant of decree. If mere existence of any degree of mental abnormality could Justify dissolution of a marriage, few marriages would indeed survive in law.

Dissolution on the ground of Leprosy:

Leprosy is a chronic disease varying in manifestations as skin, nervous, or other tissues are affected. It is infectious as well as contagious and a person can become infected with it either by infection through the breath of the sufferer or by contract. The affected part of the body becomes senseless. If a husband or wife becomes affected by it, it becomes necessary for the other spouses to keep apart from the sufferer and so is deprived of satisfaction of married life. Under the Maliki, Shafai'i and Hanbali law, the marriage of the sufferer can be dissolved at the instance of the other

78. A.I.R., 1988 S C 2264.

spouse. Imam Muhammad holds same view as held by these jurists when it is the husband who is sufferer.[79]

The opinion of Imam Maliki, Imam Shafai'i and Ahmad bin Hanbal find full support in this matter from a tradition of Holy Prophet (PBUH) that he has said:

"Flee from a leper as you would from a loin"[80]

In view of this tradition, a marriage must be dissolved irrespective of the fact whether it is the husband or wife who suffers from it. In any case, it is open to a court in such a case to apply Maliki Shafai'i or Hanbali Law to a Hanafi woman on the basis of Justice, equity and good conscience.

Dissolution on the Ground of Virulent Venereal Disease:

As pointed out the diseases specified by the jurists do not form an exhaustive list of the same. On the analogy of the tradition about leprosy, other diseases have been added by the jurists which form a ground for the dissolution of marriage. The Muslim Jurists have not mentioned venereal disease amongst those that form a basis for the dissolution of marriage. But such disease have to be avoided at all costs and a husband or wife should not be allowed to communicate them to other.

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79. Supra note 61, p. 79.
80. *Supra note 71, p. 36.*

The rules of law laid down by Imam Muhammad and Imam Ibn Qayyim to the effect that "*if a marriage is prejudicial to the interest of wife so that she cannot remain with her husband without risk to herself, let it be dissolved*", shall also apply in such case. Imam Malik and Shafai'i have laid down a general rule of law that every defect of genitals whether in the husband or wife which stands in the way of sexual intimacy is a ground for dissolution of marriage. However, the dissolution can be claimed only when the husband is suffering from virulent venereal disease and not when he is suffering from venereal disease, which is not at a stage where it can be communicated to the wife.

Legislative Recognition:

The law laid down by the Imam, Malik Shafai'i and Ahmad bin Hanbal regarding insanity, leprosy and virulent venereal disease forming as the ground for the dissolution of a marriage have also been given legislative recognition in India by passing Dissolution of Muslim Marriage Act, 1939. The relevant provision of the said Act is as under:

A Woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds; namely,

that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.[81]

The supreme court of India in *Mr 'X' v/s Hospital 'Z'*[82] held that mental and physical health is of prime importance, as one of the objects of the marriage is the procreation of equally healthy children. That is why in every system of matrimonial law, it has been provided that if a person was found to be suffering from any, including, Venereal disease in a communicable form, it will be open to the other partner in the marriage to seek divorce.

The emphasis therefore, practically in all systems of marriage is on healthy body with moral ethics. Once the law provides the venereal disease as a ground for divorce to either husband or wife, such a person who was suffering from that disease, even prior to the marriage cannot be said to have any right to marry so long as not fully cured.

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81. See: Section 2 clause (vi) of Dissolution of Muslim Marriage Act, 1939.
82. AIR 1999 S C 502.

Section 2 Clause (VII))

Repudiation of marriage on attaining puberty:

A minor can not legally enter into a binding contract nor is a contract entered into by a guardian on his or her behalf always binding on minor. The minor can, on attaining majority, ratify such a contract if he or she so chooses. A Muslim marriage is normally governed by the same principle of law as applies to contracts entered into on behalf of minors. Hence, when a marriage is contracted for a minor by a guardian he, or she, on attaining, majority, has a right under certain conditions to choose whether he or she wishes to submit to marriage or wants it to be dissolved. This right of dissolution of marriage on attaining majority is called Khyar-ul-Bulugh or Option of Puberty.[83]

In Muslim law an adult husband is considered to have an absolute legal right to dissolve his marriage, hence, it is the wife who stands mostly in need of help for the dissolution of marriage and the doctrine of option of puberty comes to her help. Therefore, the basic idea underlying the doctrine of option of puberty is to protect a minor from an unscrupulous or undesirable exercise of authority by

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83. Syed Ameer Ali; *Muhammadan law*; vol. II, P.331, (1986) Kitab Bhawan New Delhi.

his or her guardian for marriage. The right has been given to the minors to dissolve a marriage on attaining majority where guardian showed a want of affection and discretion by contracting the minor in an undesirable marriage.[84]

Religious basis of Right of Option of Puberty:

The Holy Prophet (PBUH) with the tacit approval of Allah, exercising his superior intellect decided the controversy which go to constitute the basis of the principle of the option of puberty. A tradition states

> *"Ibn Abbas (May Allah be pleased with him) reported that a virgin girl came to the Holy Prophet (PBUH) and said that her father had given her in marriage which was not of her liking. The Messenger of Allah (PBUH) then gave her option to repudiate it.*[85]

Abu Dawud reports from Khansa bint Khidhan that she was married by her father with a man whom she did not like. On hearing her complaint the Holy Prophet (PBUH) gave her option to retain or repudiate the marriage.[86]

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84. Ibid.
85. *Miskat-ul-Masabih*, Translated by Al-Haj Maulana Fazlul Karim; P.271, 3rd ed. (1994) Islamic Book service New Delhi.
86. *Sunan Abu Dawud*: Translated by Prof. Ahmad Hasan; Vol. II, P.286. (1985) Kitab Bhawan New Delhi.

Nasai reports from Hazrat Ayesha stating that a girl was married by her father against her will, where upon she complained to the Holy Prophet (PBUH). The Holy Prophet gave her liberty to repudiate the marriage. On hearing this, the girl declared; O'Prophet, I accept the decision of my father. I wanted only to show to other Women that their father's decision is not final.[87]

On the face of these traditions, it becomes clear that a minor girl married by their guardians or parents during her minority is free to repudiate her marriage on attaining puberty.

Juristic View:

According to Hanafi School of law, barring Imam Abu Yusuf, there is consensus of opinion that the marriage of minor boys or girls, got contracted during their minority by their guardians, other than their fathers or grand fathers, may, on their attainment of majority, be repudiated by them. But if the marriage has been arranged by the father or grand father during the minority of girl, they maintain the girl is not at liberty to repudiate the marriage, except when it is proved that the father or grand father is a man of loose character or that he is reputed to be a man of careless disposition. Imam Abu Yusuf is of the view that a minor girl has not

87 *Nasai*; quoted by M. Mazherruddin Siddiqui in Women in Islam; P.68 Ist ed.(1980) Adam Publishers, New Delhi.

got the option of puberty whether the marriage has been contracted by her father or grand father or any other guardian. If, however, the marriage has been contracted with an unequal man or the dower that has been settled upon is less than proper dower then, according to Abu Yusuf and Imam Muhammad the minor girl, on attaining her age of majority can exercise her right of option of puberty.[88]

The distinction observed by sunni jurists no the right to exercise the option of puberty when a marriage is contracted for the minor by the father or the grand father on the one hand and a marriage contracted by any other guardian on the other hand is based on the presumption that a father has perfect affection for his children; his guardianship, therefore, is also perfect. He is better suited to guard and take care of the rights and interest of his children than are the children themselves or any one else. As a father understands the interest and benefits of his children better than children themselves because of his abundant natural love and therefore, he cannot be expected to act against the interest of minor and contract a marriage for his minor that may not be desirable. But if it is established that he had ignored the interest of minor, then

88 *Fatawa-I-Qazi Khan*; Translated and edited by Moulvi Mohammad Yusuf Khan; Vol. I, P.166, (1986) Kitab Bhawan New Delhi.

minor is entitled to exercise this option.[89]

In fact, the arguments of the Jurists that father or grand father have greater love than the other guardians for the minor and his guardianship is perfect, hence, the minor can not be given option of puberty, has no religious basis. Their opinion is based on pure rationalization, presumption and human experience that father, being well-wisher of family can not act against real interest of minor. The presumption for which no authority has ever been quoted from the Holy Qur'an or the tradition of Prophet (PBUH) is open to the following grave objections.

Firstly, a very authentic tradition of Holy Prophet (PBUH) states that he gave away the daughter of Hazrat Hamzah in marriage to Umar bin Abi Salamah while she was still a minor and declared that after she reaches puberty, she was at liberty to repudiate the marriage. Here Holy Prophet (PBUH) did not make any exception in favour of any guardian, nor did he specify it as a reason that because he was not the father or grandfather of the girl, therefore, she had the option of puberty. He made a general statement covering all the cases. This shows that even a minor girl married by her father or grandfather has option of puberty.

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89 Ibid.

Secondly, the presumption itself has a very frail basis. There are innumerable cases where a father or a grandfather has not consulted descendent in deciding their future for their best interest.

Thirdly, even if the presumption be valid, it is quite possible that the husband of the minor girl may prove unworthy after he has grown up or he may develop habits ruinous to the health and happiness of his wife. For all these reasons arguments given by the Sunni jurists appear untenable and since Muslims are not bound by the decisions of any person except of Holy Prophet (PBUH), there is no reason why a Muslim girl who has been married by her father or grandfather before she attained age of puberty should not be given option of puberty [90].

Modification of Principle:

Thus, law propounded by the Sunni jurists do not give right to a minor girl to dissolve her marriage by the exercise of option of puberty when same has been contracted for her by her father or grand father unless their integrity is doubtful. The distinction made by Muslim jurists did not suit the present time. Under the Dissolution of Muslim Marriage Act, 1939, the provisions of Muslim law relating to suit for dissolution of marriages by women married under Muslim

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90. M. Mazharuddin Siddiqi; *Women in Islam*, p. 70 1st ed., (1980), Adam Publishers, Delhi.

law were consolidate and clarified. The wives got contracted into marriages by their fathers and grandfathers were treated at per and declared entitled under section 2 clause (VII) of the Act, to obtain decrees for dissolution of marriages from court in the exercise of option of puberty. As a result, whatever distinction in connection with the right of "option of puberty" in marriages got contracted by father and other guardians has been recognised has now been removed by virtue of this Act (VIII of 1939). Section 2 clause (VII) of the Act, reads as under:

That she having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiate the marriage before attaining the age of eighteen years; provided that marriage has not been consummated;

Time of Exercise:

Clause (VII) of the Dissolution of Muslim Marriage Act, 1939, authorises a Muslim girl to get her marriage dissolved in the exercise of right of option of puberty at anytime before attaining the age of eighteen years if she was married while she was minor, that is, before attaining age of fifteen years. it is, therefore, no longer necessary that she must exercise the option of puberty immediately on attaining puberty. Her right to exercise this option shall extend

upto the time when she attains the age of eighteen years, provided in the meantime the marriage has not been consummated on attaining age of puberty.

Therefore, consummation of marriage during period of minority with or without the consent of girl does not destroy her right because a minor is not capable of giving her consent to any act as long as she is minor and secondly,; because the right to exercise the option arises only after she has become a major and so is not lost by anything done or happening before that period of time. The option of puberty shall be considered to have been waived by allowing marriage to be consummated only if it is done after the girl has attained majority and she consented to it of her free will [91].

Necessity of Court Decree:

The most important question with regard to the option of puberty is whether the marriage stand dissolved by mere exercise of option of puberty by minor girl on attaining puberty, or it gets dissolved by obtaining a proper decree from a court of law.

Classical View :

The classical Muslim Jurists are unanimous on the point that the marriage is not affected by the exercise of option of puberty

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91. Supra note 14, p. 143.

alone. A decree dissolving the marriage from a competent court has to be obtained. In other words, by mere exercise option of puberty by the wife, the marriage is not dissolved. It subsists till a proper court passes a decree dissolving the marriage. It follows, therefore, that if the wife even after exercising option of puberty, allows consummation, it would not constitute adultery. The cohabitation would be perfectly legal, in as mush as the marriage subsisted [92].

According to Fatawa-I-Qazi Khan the de-jure separation between the couple is not effected by the exercise of option of puberty and the marriage is not dissolved until their marriage contract is annulled by a competent court. If the dissolution is effected before cohabitation , the entire dower will lapse, whether the dissolution is effected at the instance of husband or wife: if however, the dissolution is effected after cohabitation the dower shall not lapse [93].

Damad Afandi, the author of Majma al-An-hur is of the opinion that the decision of the court is a condition precedent to the dissolution of marriage through the exercise of option of puberty. The marriage is not annulled until a Qazi gives his decision thereon [94].

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92 . Supra note 24, p. 476.
93. Supra note 72, p. 168.
94. Ibid.

Ibn Al-Humam, the author of Fath al-Qadir, a most renounced and authentic commentary on Hedaya, is also of the opinion that if one of the couple dies after repudiating the marriage but without obtaining Qazi's decree, thereon surviving shall inherit from the deceased [95].

Therefore, at the strength of the above authorities it can be safely held that the marriage is not dissolved by the exercise of the opinion of puberty by the wife but it continues to subsist till it is terminated by an order of the Qazi. Syed Ameer Ali is also of the view that Qazi's order is essential condition for the repudiation of marriage in the exercise of right of opinion of puberty. The civil courts in India now have taken the place of the Qazi and so it can be assumed that a decree for the dissolution of marriage by the court is an essential condition. The opening clause of section 2 (VIII) of Dissolution of Muslim Marriage Act 1939, makes the position clear. It reads as under;

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds; namely;

that she, having been given in marriage by her father or other

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95. Ibid.

guardian before she attained age of fifteen years, repudiates the marriage before attaining age of eighteen years:

Provided that marriage has not been consummated;

It is thus, clear from the provision contained in section 2 clause (VII) of the Act, that a woman married under Muslim law is given a right to obtain a decree for the dissolution of her marriage. It does not entitle her to dissolve the marriage by herself. This leads to the obvious conclusion that it shall be only the decree of the court which shall dissolve the marriage under the said provision.

Judicial Trend:

So far as the view courts of India and Pakistan are concern there are different rulings regarding the annulment of marriage contract by exercise of option of puberty. A study of these rulings will be of interest.

Court's decree not essential:

In case of *Mafizuddin v/s Rahima Bibi* [96] court held that no decree was required under Muhammadan law to confirm the dissolution of marriage that has been effected by exercise of option of puberty, but to impress a judicial imprimatur on that Act, an order of judge is necessary.

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96. AIR. 1934 Cal. 104

There is another case, *Shafiullah v/s Emperor*[97] of Allahabad High Court. The fact of the case were that a minor girl named Majidan was got contracted into marriage by her uncle with a person named Tufail Ahmad. The girl on attaining puberty contracted her second marriage with another person. The lower court held Mst. Majidan guilty of bigamy under Indian Penal Code. The High Court in its revisional jurisdiction discussing the validly of the first marriage of the Mst. Majidan on its annulment by her exercise of the right of option of puberty stated that even if it is accepted that marriage of Mst. Majidan with Tufail Ahmad was valid when she contracted another marriage on her attaining puberty with another person, there could be no surer repudiation than the girl of her own accord on attaining puberty, married someone other than the one that she was married when she was minor.

Decree of Court essential :

In respect of annulment of marriage by exercise of option of puberty there is a case of *Osman v/s. Budhu*[98]. In this case the accused was charged with bigamy. It was, inter alia, argued on behalf of applicant that there was no valid subsisting marriage in case because the woman who had been given in marriage by her

97. AIR, 1934, All. 589.
98. AIR , 1942, sind. 92

father before she had attained the age of puberty, had since repudiated this marriage, firstly by a written notice and secondly by the second marriage which was the subject of alleged offence. The learned judges, dismissing the Revision Application of the accused held that it would appear that until she has obtained decree that the marriage has been dissolved, the marriage is subsisting.

In case of Pir *Mohd. v/s. state of Madhya Pradesh*[99] the High Court held that mere exercise of the option of repudiation does not operate as a dissolution of a marriage. The repudiation is required to be confirmed by a decree of court.

On examining the conflicting views of Muslim Jurists and of the Indian Courts, it is apparent that according to Muslim Jurists a minor girl on attaining puberty through the exercise of her right of option of puberty is entitled to express her disapproval and to repudiate the said marriage. A court's decree is, however, essential to make dissolution of marriage binding on her husband. The marriage therefore, does not appear to stand dissolved by mere repudiation through girl's exercise of option of puberty. The dissolution does not take effect until a court of law confirms the repudiation. The option of puberty is a right granted to a minor on attaining puberty. The exercise of this right by one party to marriage

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99. AIR 1960, M.P. 24

affect the right of the other party concerned. The necessity of court's intervention, thus, becomes obvious; and the question as to why the repudiation of marriage by one has been dependent on its being confirmed by the decree of court is thus answered. In this context it is to be borne in the mind that the effect of repudiation is not limited to the repudiator alone it extents to the other party of marriage as well. The decree of court is essential to make the effect of repudiation marriage binding on the other party too.

Section 2 Clause (VIII)

Dissolution of Marriage on the Ground of Cruelty:

One of the primary ends of marriage is a happy companionship of a husband and wife. The only security of marriage is the reality of marriage. There can be no happiness when the husband makes wife's life miserable and intolerable by his cruel conduct. It involves great hardship to a wife if she is tied for her life to a marriage that has proved a failure. The spirit of Muslim Law does not approve of a marriage where instead of love and affection, which are necessary objects of marriage, there is hatred and ill-feeling. Islam allows the severance of the relationship of husband and wife in such cases. The wife can apply for, and obtain a judicial decree when her husband treats her with cruelty. If a husband habitually assault his wife, making her life miserable by cruelty of conduct she can apply for a decree even when such conduct does not amount to physical ill-treatment.

The Holy Qur'an strongly condemns injury or harm being caused to the wife laying great emphasis on the kind treatment of a wife. The guiding principle in respect of treating a wife with mercy and kindness is laid down in following verses of Holy Qur'an.

"Either take them back
On equitable terms or set them free
On equitable terms,
But do not take them back
To injure them or to take undue advantage"[100]

Another Verse of Holy Qur'an states:

"O, ye who belive;
Ye are forbidden to inherit
Women against their will
Nor ye should treat them with harshness, they ye may
On the country live with them
On a footing of kindness and equity.[101]

A tradition recorded in the Fatawa-i Qazi Khan says that the Holy Prophet (PBUH) emphasized on kind treatment towards wives. Thus, he exhorted the people in his serman of the last pilgrimage and said:" you have taken them (your wives) only as a trust from God, and you have the enjoyment of their persons by words of God. So be fearful of Allah in regard to woman and enjoin that they be treat well.[102]

It is clear from the verses and the traditions quoted above that Islam lays great emphasis on kind treatment of wives and strongly condemns a husband's keeping his wife for injury or harming her. If

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100. Holy Qur'an; II:231.
101. Holy Qur'an; IV: 19.
102. Supra note 57, p. 23

the husband does not comply with the injunction of Holy Qur'an, it is obvious that he shall be guilty of transgressing the sacred text. It shall, therefore, be duty of Qazi, when he is satisfied with the merit of case, to order the husband in the interest of justice to divorce the wife. If the husband fails or refuses to do so, the Qazi must himself dissolve the marriage to save wife from hardship.[103]

Therefore, if a husband habitually insults the wife her parents or her relations or leads an infamous life, or associates with a woman of evil repute or attempts to force her to lead an immoral life, or makes her life miserable by cruelty of conduct, even when it does not amount to physical ill-treatment, the wife shall have a right to apply for and obtain a decree of divorce.

However, under Hanafi law, there is no provision to dissolve a marriage on the basis of the wife's ill-treatment by the husband. This resulted in great hardship to the wives in many cases and it was found necessary in many cases to give them adequate relief. The Hanafi jurists have formulated rule to adopt law of another Imam of the Sunni sect when circumstances so required. The Maliki law provides that when a husband is guilty of ill-treating his wife, she can complain to the Qazi who shall investigate the matter. If the

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103. Ibid.

wife's complaint is found to be correct, the Qazi shall severely admonish the husband and may even order his chastisement. If the wife is still subjected to ill-treatment by the husband and she makes repeated complaints to the Qazi but has no proof in support of her allegations, the Qazi shall appoint two arbitrators one representing each party to look into and decide the case. If they deem it fit and proper to separate the parties they may make declaration to that effect. This declaration shall amount to a judicial decree for the dissolution of marriage. This dissolution, however, will be a revocable divorce. If the wife complains of cruelty of her husband to the Qazi and he is satisfied of the genuineness of her charge, he can dissolve the marriage even in cases where the husband's misconduct is not of long standing.[104]

According to Shafi'i and Hanbali law if the wife complains to the Qazi that her husband is of an irritable temperament or that he ill-treats her without a cause and the Qazi is satisfied about the genuineness of her charge, he will appoint two arbitrators with the consent of parities. The arbitrators will investigate the matter and will try to bring about reconciliation between the parties. If they find

104. Dr. Zeenat Shaukat Ali; *Marriage and Divorce in Islam*; An appraisal, P.229 (1987) Bombay.

that no compromise is possible, they can dissolve the marriage. Their decision shall be binding on both the parties.[105]

According to Shia law, if the husband is at fault and deprives the wife of any of her rights, she can complain to the judge for redress. The judge shall admonish the husband and ask him to fulfil his responsibilities, but he can not chastise the husband or dissolve the marriage. If the parties can not live together in peace and there is discord between them they can have recourse to the procedure adopted for discord (Shiqaq). The judge shall appoint two arbitrators representing each other. If they can bring about a reconciliation the matter ends there. But if they decide to separate the parties, a divorce shall not be valid unless the husband agrees to it. If they decide in favour of a khula, the same shall not be valid until and unless the wife is prepared for the same. This aspect of law resulted in great hardship to a Shia wife too.[106]

Therefore, in order to remove the hardship caused to the Hanafi and Shia wives, the principles laid down by Maliki and Hanabali schools in this regard was allowed to be adopted when absolutely necessary. The law laid down by Maliki schools regarding ill-treatment of wife by her husband was given legislative

105 Ibid.
106 Supra note 14, p. 773.

recognition in India as well as Pakistan by enacting clause VIII of Section 2 of the Dissolution of Muslim Marriage Act 1939. The said clause reads:[107]

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any or more of the following grounds, namely

(VIII) That the husband treats her with cruelty, that is to say:

(a) Habitually assaults her or makes her life miserable by cruelty of conduct even when such conduct does not amount to physical ill treatment or,

(b) Associates with women of evil repute or leads an infamous life,

(c) Attempts to force her to lead an immoral life,

(d) Disposes of her property, or prevents her exercising her legal rights over it,

(e) Obstructs her in performance of her religious profession or practice, etc.

(f) If he has more wives than one, does not treat her equitably in accordance with the injunctions of Qur'an.

The cruelty has, always been recognised as ground for the dissolution of marriage under the traditional Muslim law. The

107. Section 2 clause (VIII) of Dissolution of Muslim Marriage Act, 1939.

Muslim law as derived from Holy Qur'an and sunna throws considerable light on the concept of cruelty by prescribing various norms of behaviour for both the husband and wife. The injunctions of Holy Qur'an, the traditions of Holy Prophet (PBUH) and the deliberations of Muslim Jurists provide a clear view of what constitutes "cruelty" in Islamic sense.[108] Broadly speaking:

1. What is not based on justice is cruelly.
2. What is not based on principle of equity is cruelty.

Thus, any transgression of divine law or deviation from sunna and established traditions in matrimonial relation may be called cruelty to the other party. The cruelty has not been defined in absolute terms. The concept has to be understood in relation to status and grooming of the pair, the social conceptions of time, victim's capacity to endure effect on body and mind, etc. The court does not view it in the frame of an ideal couple, but in context of expectations from a normal couple. Beating, bodily assaults, physical violence, ill-treatment false accusations about her character, civil or criminal suits against her to harass or coerce to part with property, neglect, cessation of marital intercourse, are some of examples of legal cruelty.

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108. Dr. Mohammad Ashraf ; *Cruelty to Married Women*: An Islamic View; Civil and Military Law Journal: Vol. 32, P.136, April-June(1996) New Delhi.

The leading English case on the point is *Russel v/s Russel*[109] wherein *the* whole concept of matrimonial cruelty was discussed. The view was summed up by the court in following words:

"The legal concept of cruelty which is not defined by statute, is generally described as conduct of such character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. It may be mental, such as, indifference and rigidity towards wife, denial of company to her, hatred and abhorrence for wife, or physical acts of violence and abstinence, from sexual intercourse without reasonable cause."

It is significant to note that in English law no statute has ever defined the term cruelty and the comprehensive ruling laid down by court in *Russel* v/s *Russel* have consistently been followed and still is followed as leading case for the test and definition of matrimonial cruelty.

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109. IR (1897) AC 395.

In case of Muslim parties, judiciary applied the English principle of cruelty. In *Ghoas Ali v/s Firoz a Khatoon*[110] it has been held that the conduct on the part of the husband which renders her (the wife's) life miserable is sufficient to attract the provision of section 2(VIII) of Dissolution of Muslim Marriage Act, 1939 and it is not necessary that the treatment has to be accompanied by some physical assault on her. The entire bundle of circumstances and the background of such occurrences as well as the effect on the life and the mental well-being of the wife has to be considered in arriving at a finding whether the wife's life was rendered miserable thereby or not.

In *Moonshee Buzloor Rahman v/s Shamsoonissa* [111] explaining the concept of cruelty in Muslim law, the court observed.

"The Muhammadan law on question of what is legal cruelty between man and wife, would probably not differ materially from our own concept of which one of the most recent exposition is the following. There must be an actual violence of such character as to endanger personal health or safety or there must be a reasonable apprehension of it.

In *Zubaida Begum v/s Sardar Shah* [112] it has held that disposal of property which would attract the provision of clause (VIII) (d) of

110. P.L.D. (1969) Dacca, 548
111. 11 MIA, 551.
112. (1943) 210, I.C. 587.

Section 2 of the Dissolution of Muslim Marriage Act, 1939 is disposal by a husband, without the wife's consent of a substantial portion of her property not for her benefit but for his own selfish ends and in a wasteful manner, with the intention of depriving her of her property. It is mere disposal without any intention that makes the conduct actionable. If the disposal is with her consent, then the matter should be pursued to the full implications of that consent. If, for instance, the plaintiff allowed her husband to sell her property or even requested him to do so with the object of depositing the sale proceeds in bank and the husband after complying with the first part of the request appropriated the money to his won use, it will constitute disposal under clause VIII (d) of Section 2 of dissolution of Muslim Marriage Act, 1939.

Where the wife began to live separately because of ill-treatment of the husband, and the latter did not make any effort to treat her at all, much less to treat her equitably, in accordance with the injunction of Qur'an, the case falls within section 2(VIII) (f) of the Act.

In *Begum Subanu v/s A.M. Abdul Gafoor*[113] , the supreme court has held that sharing the matrimonial bed with the second wife of the

113. AIR. 1987, S.C, 536.

husband constituted matrimonial injury affording her a ground to live separately from the husband.

The court as a rule did not before the passing of the Dissolution of Muslim Marriage Act, 1939, take into consideration the infliction of mental or legal cruelty by the husband on the wife. However, the clause VIII of section 2 of Dissolution of Muslim Marriage Act, 1939 has provided a much needed clarification of the attitude of Muslim law towards a husband's cruelty to his wife. A Muslim wife can now sue for the dissolution of her marriage even when the husband's conduct does not amount to physical cruelty but constitute only mental cruelty.

It will be seen from the above discussion that Muslim law has laid some general but important principles of law dealing with husband's cruelty. Although actual examples have not been discussed, we can deduce rule for our guidance from those general principles to meet particular cases. A further difficulty is the absence of case law on the subject in India due to the fact that Muslim women were tough to consider it their duty to bear patiently all kind of cruelty at the hands of their husbands without seeking assistance from a court law. Under Muslim law there is no stigma attached to a wife seeking or obtaining a divorce but in Indian Muslims were

greatly influenced by the thoughts and practice of their neighbours, Hindus. Hindu law did not at one time allow divorce or dissolution of marriage to wife and Muslim wives, belonging to respectable families, likewise, started considering it abhorrent to seek a divorce. They preferred to bear all sorts of hardship rather than bear what they considered the shame and disgrace of a divorce.

The attitude of courts was also responsible to some extent for this hesitation to seek dissolution because they generally applied Hanafi law to the Hanafis even when it involved unnecessary hardship. It seems their attention was not drawn to the practice of Hanafi jurists who allow the adoption of law of another sect of Sunnis whenever necessary or desirable in the interest of justice. The dissolution of Muslim Marriage Act, 1939 has solved the difficulty in India and Pakistan. Many other Muslim countries have also made the husband's cruelty to the wife a ground on the basis of which a marriage can now be dissolved by the court on the basis of ill-treatment of wife by the husband.

Section 2 Clause (ix)

Grounds of Dissolution Recognised by Muslim Law:

Section 2 of the Dissolution of Muslim Marriage Act, 1939 after specifying in clause (I) to (VIII) the eight specific grounds on which a Muslim wife shall be entitled to obtain a decree in a suit for dissolution of her marriage, proceeds to provide in clause (IX) that the wife shall also be entitled to obtain such a decree "on any ground which is recognised as valid for dissolution of marriage under Muslim Law".

This is a residuary clause covering other grounds which are recognise as valid under Muslim law, such as Khula, Mubara'at, Tafwid, Ila, Zihar and Lian. The imputation of unchastity, a false charge of adultery and incompatibility of minds between the spouse have been recognised as valid grounds for a decree of dissolution of marriage under clause (IX) of the Act. The grounds of dissolution of marriage as recognise under classical Muslim law find detail discussion in the scheme of thesis in the shape of separate chapters. However, it is to be pointed out that giving legislative recognition to the Khula, Mubara'at and Talaq-e-Tafwid as a valid ground for a decree of dissolution of marriage under the Act, merely broadens the scope of the Dissolution of Muslim Marriage Act, 1939, otherwise the right of a Muslim wife to dissolve her marriage by way of Khula, Mubara'at and Tafwid is very much available under the shariah law and can be exercised even after the commencement of the Act, 1939 without the intervention of court.

CONCLUSION AND SUGGESTIONS

The institution of divorce, as provided under Islam, has been the subject of repeated controversy and is still a live issue capable of generating much heat and passion due to the changing concept of gender equality and emancipation in the western civilization and its impact on the woman in general. The present study constitutes an academic venture into the dynamics of Muslim Personal law relating to the Dissolution of a Muslim Marriage at the instance of a wife. A ceaseless effort has been made to establish, after making an exhaustive study of relevant verses of the Holy Qur'an, Hadith literature and the juristic works, that as the Muslim Husband has been given the right to divorce his wife with whom he can no longer pull on for the just and reasonable cause, likewise, a Muslim wife also enjoys the privilege of being able to discard her husband with whom it has become impossible for her to continue marital life with observance of limits set by Allah and His Holy Prophet (PBUH). The wife's right to dissolve the marriage under the classical Muslim law, such as Khula, Mubara'at and Talaq-e-Tafwid are in no sense inferior to the right of divorce given to her counterpart. The rights empowering the wife to seek dissolution of her marriage under the classical Islamic jurisprudence and their recognition by modern

legislation and judicial pronouncements have been dealt with at length in different chapters given in order. However, the dispassionate study of the thesis as a whole invariably leads to the following conclusion followed by brief suggestions which may go a long way to clarify the misgivings and misunderstandings conceived by many as to this aspect of Shariah.

As it has already been seen and discussed that all the human civilizations except Hinduism had adopted the institution of divorce in marital relation because it is considered a necessary corollary to the contractual form of the marriage. The Hebraic law, the Athenians, the Romans, the Shammities and others upheld this doctrine in various forms. But in all these systems the husband had predominant authority with no efficient check on his capricious power of divorce. The Christian as well as Jewish also recognized this institution. In pre-Islamic Arabia divorce was resorted to as an instrument and a means to torture the disliked and discarded wife. The husband could divorce his wife out of sudden caprice or whim while she was in the state of menstruation or even when she was pregnant or nursing a newly born child without undertaking any obligation towards her.

The social and the moral ills and gender injustices being perpetrated by the Arabs immediately before the advent of Islam engaged the attention of Holy Prophet of Islam. Fully conscious of the evils the flowing from divorce he under the Divine guidance and inspiration framed the laws of marriage and divorce to remove these evils. The laws so framed by him fully ensured, full dignity and honourable status of women without impairing individual freedom of seeking separation under the human necessity for just and reasonable cause. Therefore, a survey of brief historical evolution of the institution of divorce prove adequately beyond any shadow of doubt that Islam is not the originator of the institution of divorce. It simply tolerated it in the larger interest of society but only after effecting necessary reforms and gave it the most complete, satisfactory and humanistic form. It also gave the woman the right of dissolving marriage which was almost unthinkable until recently for any civilized nation.

It is an acknowledged and Quranically established fact that Islam recognises the necessity of divorce but only in case when marital relationship have been so poisoned to such a degree which makes a peaceful home life impossible. But Islam does not believe in unlimited opportunities for divorce on frivolous and flimsy grounds,

because, any undue increase in the facility of divorce would destroy the stability of family life. Therefore, while allowing divorce even on genuine grounds Islam has laid down procedures of divorce elaborately in order to check hasty actions and laws the door open for reconciliation at many stages.

The right method of pronouncing divorce as provided in the Holy Quran and the authentic traditions is that if and when it becomes inevitable, it should be pronounced only when she is not in her menses and even if a dispute arises during the monthly period it is not right to pronounce divorce during that period, rather he should wait for her to cleanse herself and then he may pronounce a single divorce, if he so likes. Then he should wait for her next monthly course and pronounce the second divorce after she is cleansed, if he so wishes. Then he should wait for the next monthly course to pronounce the third and the final divorce after she is cleansed. It is however, better to wait and reconsider the matter after the first and the second pronouncements because in the case of first and second divorce the husband retains the right to take her back as his wife after their expiry. But if divorce is pronounced for the third time, the husband forfeits the right to take her back, and the couples cannot remarry with each other.

Thus, the procedure of divorce spoken of in the Holy Qur'an and by the Holy Prophet (PBUH) is aimed at to enhance the chances of reconciliation and thereby reducing the cases of dissolution of marriage by offering enough time for cool thinking, reconsideration, persuasion and reassessment of consequences of the termination of marriage.

Talaq-e-Sunnat definitely and clearly aims at to eliminate the pre-Islamic abuses of marital relations and seeks to limit the arbitrary and unfettered right of the husband to terminate marriage. In the face of discouraging attitude of Holy Qur'an and Sunnah of Holy Prophet (PBUH) and the over emphasis on reconciliation and resumption of marital tie, the Islamic law of divorce is more like doctrine of reconciliation rather than rule of separation.

As for those ignorant people who pronounce divorce thrice at the one and the same sitting, they commit a heinous sin against the Divine law. The Messenger of Allah (PBUH) has severely denounced this practice for the reason that in this mode of divorce, there is no time which is necessary to provide an opportunity of repentance, reconsideration, reconciliation and rapprochement of strained relations; also under this formula there is no chance for the husband to recall the wife.

A deep and dispassionate study of the chapter "Triple divorce" bring out clearly that divorcing a woman instantaneously by the simultaneous pronouncements of three divorces is not only a sinful act but a flagrant violation of Quranic mandates contained in verses 19; 34; 35; 128; 228; 229 of Sura Al-Baqar as well as verses 1;2;5;7; of Sura Al Talaq and the well known and clear approach of Holy Prophet (PBUH) of Islam.

The Holy Prophet (PBUH) and his most of the companions, regarded triple form of divorce morally reprehensible and held the person responsible as a sinner. Hazrat Umar, the Second Caliph used to punish irresponsible and unscrupulous husbands resorting to this formula of divorce.

In fact he introduced this principle as a punitive deterrent administrative measure to discipline the careless and irresponsible husband and to protect the interests of women who were being subjected to suspensory divorce. What Hazrat Umar had considered disciplinary and reformative measures against the unscrupulous husband of that time turned out with the change of time and conditions to be more harmful to innocent women.

Later Muslim scholars, like Imam Ibn Taymiah, Ibn Hazm and Ibn Qayyim had also held triple divorce in one sitting invalid and

had tried by their forceful arguments to redress this situation by advocating to go back to the early practice of the days of Holy Prophet (PBUH) by treating it as one revocable divorce.

At present time triple divorce under the stress of an emotion has become a widely-spread practice, especially, in non-Islamic countries. As emotion subsides, shame and regret grips the guilty conscious of a man and a vain search starts for some excuse to undo what has been done. Some take shelter behind false oaths to deny having divorced; others arrange a spurious second marriage of the wife followed by remarriage with themselves. To put an end to these evil practices, preventive legislative measures of various kinds have been taken by the various Muslim countries of the world which represent to some extent the spirit of Islamic law of divorce. In India, recently a Fatwa issued by three Muftis of Ahl-e-Hadith declared the pronouncement of triple divorce at one sitting invalid illegal and ineffective. Even the progressive Muslim intellectuals like Maulana Wahiduddin Khan and Engineer Ashgar Ali have also upheld the Fatwa. They argue that if Shariah is truly based on Quran and sunna then there is no place for pronouncement of triple divorce in one sitting. The arguments built up by them definitely fit in the frame of shariah.

Despite the clear-cut warning and strong disapproval of the Talaq-e-Biddat by the Holy Quran, the Holy Prophet (PBUH), classical and modern Islamic jurists, the Indian courts have recognised the pronouncement of the triple divorce as lawful, effective and valid. The common phrase used by the court is that Talaq-e-Biddat or triple pronouncement of divorce is good in law though bad in theology. But as we have seen that in majority of cases the courts have either regretted its action or found themselves helpless to pronounce verdict in opposition to the earlier rulings. In some cases courts attempted to deliver a verdict against the established law on triple divorce but contended by repeating old dictum. However, in Ziauddin's case, Justice Baharul Islam gave a revolutionary judgement which was in consonance with true Islamic law but it has not been reported. Justice H.N. Tilhari in Rahmatullah's case held that the triple divorce is against the injunction of Holy Qur'an and is a sin. Therefore, if a person has pronounced triple divorce it means that he has adopted an un-Islamic procedure of divorce. It is a high time for the court to discourage it by following the Islamic principle of divorce and the triple divorce should be treated as a single revocable divorce within the period of iddat.

An in-depth study of chapter on Khula and Mubara'at have made it clear that Islamic matrimonial law maintains a balance between the rights of man and woman by treating them on equal footing from cradle to grave. As the husband has been given right for securing release from an unhappy and disharmonious marriage, similar rights have been given by Islam to a wife to get rid from a unwanted and torturous companionship.

There are two ways in which a woman is allowed to seek separation from her husband. First through mutual agreement between the husband and wife which includes Khula, Mubara'at and Talaq-e-Tafwid. Secondly, through a judicial decree by filing a suit against the husband in a law-court. It has been seen that the wife is not at liberty, like the husband, to get herself released by an outright declaration of divorce under Khula or Mubara'at. In such situation if the husband refuses to release her from the marriage bond, she has to knock the door of court and may obtain a decree of dissolution of her marriage. This may seem to place her at a disadvantage in comparison to her husband and it is asserted that this implies in-equality of rights as between husband and wife. Actually, the intervention of the state in the matter is a device for the fuller protection of her rights. Conditions all over the world, including western countries, are such

that a woman is not altogether free to exercise her legal rights. The husband can, if he so desires, place many impediments in her way. If the state does not come to her help in order to safeguard her rights, the woman may find herself handicapped in many ways despite big talks and preachings of sea equality. It is therefore, in her own interest to seek support of authority in defending and exercising her rights.

There is no dispute about a woman's legal right to seek the dissolution of her marriage from her husband under khula. This she may do either by giving up a part or the whole of the dower given to her by the husband or by offering an agreed sum of money to her husband in return for his consent to release her from the marriage bond. In case the husband refuses to release his wife from the marriage tie even when it is established that he and his wife cannot keep together within the limits of Allah and the wife is prepared to pay a consideration for getting out of marriage tie, it shall be open to the wife to seek the help of law by filing a suit against the husband and the court, if otherwise satisfied, may grant a decree of dissolution. In Bilqees *Fatima v/s. Najmul Ekram*, it was held that if the court arrived at the conclusion that the couple could not be able to maintain the limits set by God, it could then get Khula effected

even against the consent of the husband by ordering the wife to pay reasonable compensation to the husband.

The actual legal decisions by the Holy Prophet (PBUH) in the case of Jamila, the wife of Thabit bin Qays shows the spirit and principles which the law courts should apply to the cases of Khula brought about by women against their husbands. The cases decided by Holy Prophet (PBUH) and his companions also suggest that it is not proper for the court to inquire whether a wife seeking Khula is doing so because she is sexually erotic and desires a variety of sexual pleasure or aversion to her husband springs from genuine causes. The mere fact of a woman becoming disgusted with her husband is sufficient ground for legal separation between them. In case of Jamila, the Holy Prophet (PBUH) showed by his action that a woman's disapproval of her husband on physical ground may be a legitimate cause for a decree of dissolution in her favour. It is therefore, enough for the court to satisfy itself that one of the parties has developed sufficient antipathy against the other making the reconciliation impossible. The court need not inquire into detailed reasons of antipathy, because a woman may dislike her husband on many grounds some of which she may not like to disclose openly.

So far as the payment of compensation to the husband in lieu of wife's emancipation from marital bond is concerned, it is a settled principle of law that the husband can not claim more than he has already given his wife as dower. If the separation comes of as a result of mutual agreement without the intervention of court, the quantum of compensation has to be settled between the two partners. But it the husband does not agree to the Khula proposal of wife and dispute is brought to the court, then power vests in the court to fix the amount of compensation to be paid in lieu of her release. In this regard judicial trend in Pakistan has been to stipulate a sum which go only to the extent of return of benefits earlier derived by the wife from husband and not beyond that. Many jurists agree that if Khula takes place as a result of the ill-treatment of the husband or his excesses and such charges are proved during the process of legal inquiry, the court can totally exempt the wife from the payment of Khula compensation.

The judicial opinion in Pakistan is divided on the issue as to whether the payment of compensation can be made a condition precedent for the operation of Khula. But the courts in Pakistan have overwhelmingly endorsed the viewpoint that payment of compensation by the wife to the husband cannot be made condition

precedent and its non-payment cannot nullify Khula. Additionally, the non payment of compensation does not affect other rights of wife, such as, maintenance during Iddat and unpaid dower.

Under the law of Islam, like the husband, the wife too can put to an end to the marriage by her unilateral action. This she can do under what is called talaq-e-Tafwid. This enables, the married women to dissolve their marriages without the consent of their husbands or the intervention of a court or any other external agency. The basis of this power of wife is its Tafwid (delegation) to her by mutual agreement of parties incorporated in their contract of marriage. The only major difference between the position of the husband and the wife in this regard is that while the husband derives his power of unilateral talaq from the law itself, the wife may derive it from the husband under the marriage agreement entered into either at the time of marriage or at any time before or after the marriage. The delegation could either be absolute or accompanied by conditions which are reasonable and not opposed to policy of Islamic law. The contingencies specified in the agreement of Tafwid on the happening of which the wife can pronounce the talaq, can include non- payment of Mahr, cruelty or bigamous marriage by the husband or ex-communication of husband. The pronouncing of divorce by the

wife in the exercise of delegated authority of divorce is as good as husband's pronouncing it in the exercise of power of Talaq. The doctrine of freedom of marital stipulation is specifically recognised by legislation in Jordan, Morocco, Syria, Tunisia, Bangladesh and Pakistan. All lawful conditions mutually agreed upon at the time of marriage, and also an option reserved by the wife to dissolve the marriage if any such condition is violated, are judicially enforceable in these countries. In Morocco such a Talaq is irrevocable and in Bangladesh and Pakistan, like a Talaq by husband it is to be notified to a local official for constitution of an 'arbitration council' which will explore the possibilities of avoiding it.

This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without intervention of any court and is now beginning to be fairly common in India.

The privy Council in *Moonshee Buzul-ul-Raheem v/s Lateefun Nissa* discussing about extra judicial divorce under Muslim Law pointed out that under Mohommedan law , the divorce may be made in either of two forms i.e., Talaq or Khula. The Supreme court in *Zohara Khatoon v/s Mohd. Ibrahim* also did not mention Ila or zihar as a mode of divorce. The shariat Act, 1937, however, while

mandating application of Muslim Law in all question relating to dissolution of Muslim marriages, has specifically mentioned, Talaq, Ila, zihar ,Lian, Khula and Mubara'at as different modes of dissolution of marriage under Muslim law.

However, Fyzee has observed that although Ila and zihar find mention under shariat Act, 1973 but they are very rare in India and of no practical importance and have become absolete in India, Fyzee has also referred to a division bench decision of Allahabad High court in *Bibi Rehana Khatoon v/s Iqtedaruddin Hussain* and has commented that a case of Ila was unsuccessfully raised in that case. But it must be noted that the ground of Ila failed in that case on the basis of its facts, and not that Ila as a legally effective mode of divorce was not available under the law though it was pointed out that this mode of divorce has become obsolete and is being exercised rarely.

According to Tyabji' zihar has hardly any significance so far as the law courts in India are concerned. But after shariat Act 1937 specifically recognizing these modes and section 2(IX) of Dissolution of Muslim Marriage Act, 1939 entitling a Muslim wife dissolution of marriage on any other ground which is recognised as valid under Muslim law, all these modes have acquired some

significance. Therefore, neither the privy council decision in the Munshee Buzul-ur-Raheem nor the supreme court decision in Zohara Khatoon case can be regarded to have made accurate statement about the different modes of dissolution of marriage as neither has mentioned Ila or Zihar.

Therefore, when under Muslim law a husband can get rid of his wife unilaterally and literally at his whim or pleasure by talaq mode, there should have been usually no occasion to resort to his circuitous and round about of Ila or Zihar mode of divorce and that is also reason why these modes have been rarely used. Since a Muslim husband has an unfettered right to walk out of wedlock at his whim by short and straight route of Talaq, he would seldom, if at all, be expected to take a longer route.

If the husband charges his wife with adultery, the court after giving certain oaths to the wife and husband will pass a decree for separation where the husband persists in levelling such unapproved charge. This procedure is called Lian. However, the allegation or charge does not dissolve the marriage, but that entitles the wife to sue for divorce and to a decree, if the charge is proved to be false, but of course not, if it proved to be true. The marriage continues until the decree is passed. Lian is therefore, a divorce by or at the

instance of wife though effected through judicial process. The Dissolution of Muslim Marriage Act, 1939, which has entitled a woman married under Muslim law to obtain a decree, for divorce on certain grounds specified therein, does not mention false charge of adultery against the wife as a ground to sue for divorce. But since the Act in section 2 (IX) thereof entitles a wife to sue for divorce "on any ground which is recognized as valid for the dissolution of marriage under Muslim law", such a suit would be maintained under the said provision.

Apart from cases of Ila, Zihar Lian, ill-treatment and genuine aversion of wife against the husband, Islam recognizes other grounds of divorce on the basis of which a Muslim wife may seek the dissolution of her marriage. These are the option of puberty; refusal to provide economic sustenance; change of religion; impotency; infectious diseases in either partner, willful desertion and disappearance of husband.

The rights given to the women by Islam for demanding separation from their husband command the sanction of Holy Quran, Sunna of Holy Prophet (PBUH) as well as the jurists of four Imams. The wife's right to dissolve the marriage on the grounds specified by the Holy Qur'an and sunna and the circumstances which occasion to

harsh step of dissolution have been given legislative recognition in India by passing the Dissolution of Muslim marriage Act, 1939. Consequently, a women married under Muslim law can repudiate her marriage on grounds specified in clause (I) to (IX) of dissolution of Muslim Marriage Act 1939.

Thus, the reform effected in the institution of divorce by Holy Prophet (PBUH) under the Divine guidance marked a new departure in the history of Human civilization. He restrained the unlimited power of divorce of husband and gave the women, the right of obtaining the separation on reasonable ground, which is shiqaq disagreement to live together as husband and wife.

It is therefore submitted that Islam has maintained more or less absolute equality between man and woman by granting the woman all the basic rights which are essential for her dignified survival and which are still denied to her by most of the societies. The rights, significantly, include the right to choose and change the life partner. The divinely revealed expression, " *And if ye fear a breach (Shiqaq) between twain,*" would imply that either the husband or wife wants to break-off the marriage agreement and hence either may claim a divorce when parties can no longer pull on in agreement. There is no doubt that man enjoys a greater degree of freedom regarding mode of

effecting his unilateral action of divorce, because he has no need to resort to a court of law. But there is a reasonable justification for making this restriction necessary in the case of woman. Justice V.K. Khalid in *K.C. Moyin v/s. Nafeesa* giving justification held that "if without intervention of court, marriage can be dissolved by unilateral repudiation by the wife calamitous result will follow as this would be exploited by the unscrupulous father in-law or other near relatives of wife to get rid of recalcitrant or poor son in law but loving husband.

It is, therefore, crystal clear from the foregoing discussion that as far as facilities for divorce is concerned Islam has given equal rights to the member of female sex. The right to dissolve the marriage conferred on women by the Holy Prophet (PBUH) of Islam fourteen hundred years ago have only partially and grudgingly been given to them in western and Eastern countries during the course of last two centuries. Similarly, with respect to sex equality, the essential human dignity and fundamental equality of woman, Islam is at one with the leaders of feminist movement. But as the application of an abstract principle is qualified and conditioned by social realities and concrete situations, Islam has modified its stand on sex equality in consonance with social, biological and sex realities.

Now we may proceed towards the suggestive part of the conclusion. It is a glaring fact and hard truth that Muslim law relating to matrimonial relation, as practiced today, has taken a course contrary to the letter and spirit of Shariah and therefore, causing hardships and miseries to the Muslim women contemporary generation. The sooner it is set right, the better will follow for the Muslim society.

To my mind there are two possible solutions to the problem discussed in the thesis. One is perfect and permanent while the other is relative and temporary. One relates to the change of heart and mind of the Muslims, the other relates to the procedure and precaution to be adopted, one is for eradication and the other is for minimization of ills.

The first and foremost is an all out effort by Muslims in general and Ulema in particular, to transform Muslims into a religiously conscious and God fearing community, in a society of true believers and practitioners. The proper functioning and perfect implementation of Shariah depends on the willingness of minds and receptibility of heart of the governed (Muslim) which can not be created or implemented by exterior measures. It can be achieved only through the purification of soul by an inner change. This solution

may appear to many as only an ideal and not practical but infact this is the only lasting solution of ills. But I concede that this solution is more difficult and more time consuming. Therefore, it may be submitted that the following suggestions to be adopted and may be given legislative shape to minimize abuse of Shariah regarding dissolution of marriage and restore the women their dignified place in the society.

Both the practice of capricious unilateral divorce and Talaq-e-Biddat must be condemned with utmost force and persuasion. It is still not too late for our right thinking Ulema and Muslim Jurists to come forward with firm and convincing arguments that the prevalent customs of triple divorce is wrong, sinful, un Islamic, arbitrary and capricious. They must sit down, deliberate and come out with a joint declaration that this form of divorce is sin and socio-moral crime and suggest proper remedies to root it out.

It is therefore suggested that the right course is to go back to Quran and sunnah and seek direct inspiration and guidance from them. Under Shariah, so far as the permissible acts are concerned, the elimination of ill-effects and misuse gets priority over securing advantages. Divorce in Islam, is the most disapproved and detestable of all the permissible things (Ahghad-ul-Mubah). The divine stamp

of Qur'an and Sunnah is available to bridle the reckless exercise of male's right and to impose religiously and judiciously tested restraints for exercise thereof. But care must be taken that no right or obligation repugnant to the Qur'an or Sunna is created.

Divorce to be legal and effective must strictly follow the specification of Shariah i.e., it must be in the form of Talaq-e-Sunnah. Any other form of divorce, in conflict with the letter and spirit of Quran or Hadith, must be outlawed and be declared a crime punishable with stringent fine or imprisonment or both.

The modern legislations enacted in many Muslim countries of Africa and Asia, under which no marriage could be dissolved without the intervention of a competent court or arbitrators of administrative body appointed for the purpose and the provision of compulsory reconciliatory proceeding in all cases of divorce have, to a great extent, enforced the spirit of Quran and sunna.

The precautionary measures incorporated in these legislations may be taken by Ulema, Muslim Jurists and Muslim intellectuals too and a process of proper interpretation in right tune with the teaching of Islam must begin. It will be a positive step to bring the law in the line with the spirit of Shariah. These measures will go a long way to

provide a safeguard against the misuse and abuse of Islamic law of divorce and will go to protect women from male tyranny.

The right to dissolve the marriage under the doctrine of Khula available to the wife under shariah, in a male dominated society seems to be difficult and expensive to exercise. The procedure and administrative mechanism must be evolved to make the exercise of this right easier and free of cost.

In Pakistan, the problems pertaining to divorce are settled through judicial process in the light of law inherited from classical Muslim jurists. It is a high time that a legislation relating to Islamic matrimonial law, on the pattern of Muslim counties, be enacted in India too. With regard to the payment of compensation in Khula such legislation should be incorporated in a provision whereby courts should be authorised to determine the quantum of payable compensation keeping in view the circumstances of each case.

Under the Dissolution of Muslim Marriage Act, 1939, the Muslim wife may apply to the court seeking dissolution of her marriage on the ground of her husband's tyranny and cruelty to her and the court may, on such tyranny and cruelty being proved, dissolve the marriage. It is however, not the practice of the courts to appoint arbitrators in these proceedings, in the absence of any

provision providing for the appointment, power and functions of arbitrators. It is, therefore suggested that separate rules for the arbitration be made by introducing suitable amendments in the relevant provisions of Dissolution of Muslim Marriage Act, 1939, for resolving marital dispute.

Islam exhorts the spouses to sort out their marital dispute outside the court to avoid greater and far-reaching harm to their future life. Islam does not like the washing of one's dirty linen under the pretext of Shariah. But it is realistic enough to take recourse to law where persuation fails to save the pious purpose. To achieve this end and to set the things right the recourse even to legislation, properly and legally enacted, is not un-Islamic but recommended.

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